THE INDIAN LAW REPORTS

M.P. SERIES

CONTAINING-CASES DECIDED BY THE SUPREME COURT OF INDIA AND THE HIGH COURT OF MADHYA PRADESH

Year-9
Vol.2

APRIL 2017 (pp. 773 to 1014)

VOL.2

INDIAN LAW REPORT (M.P.) COMMITTEE

APRIL 2017

PUBLISHED BY

SHRI AKHIL KUMAR SRIVASTAVA, PRINCIPAL REGISTRAR (ILR)

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Prevention of Corruption Act (49 of 1988), Section 3 & 4 – **Jurisdiction of Special Court to frame the charges against the persons other than public servants for offences falling under IPC or any other law for the time being in force when it had discharged the other co-accused persons who were the public servants – Held – No charge of any conspiracy was framed against any of the non-public servants coupled with any of the sections of the Prevention of Corruption Act – It is also not a case where the public servant had died after framing of charges against all accused persons whereas public servants have been discharged – Wrong interpretation of the ratio laid down in the case of Jitendra Kumar Singh and failure in analysing the import of Prevention of Corruption Act itself – Impugned orders were quashed – Special Court is directed to remit the charge sheet to Chief Judicial Magistrate to proceed in accordance with law. [K.L. Sahu Vs. State of M.P.] (DB)...959**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 3 व 4 – भा.दं.सं. अथवा वर्तमान समय प्रभावी किसी अन्य विधि के अंतर्गत आने वाले अपराधों के लिए लोक सेवकों के अतिरिक्त व्यक्तियों के विरूद्ध आरोप विरचित करने की विशेष न्यायालय की अधिकारिता जबकि उसने अन्य सह अभियुक्तों को आरोपमुक्त किया था जो कि लोक सेवक थे – अभिनिर्धारित – किसी गैर–लोक सेवक के विरूद्ध, कोई भाड्यंत्र का आरोप भ्रष्टाचार निवारण अधिनियम की किसी धारा के साथ विरचित नहीं किया गया था – यह ऐसा प्रकरण भी नहीं जहां सभी अभियुक्तगण के विरूद्ध आरोप विरचित किये जाने के पश्चात् लोक सेवक की मृत्यु हुई थी जबकि लोक सेवकों को आरोपमुक्त किया गया था – जितेन्द्र कुमार सिंह के प्रकरण में प्रतिपादित आधार का गलत निर्वचन एवं भ्रष्टाचार निवारण अधिनियम के प्रयोजन का विश्लेषण करने में विफलता – आक्षेपित आदेश अभिखंडित – विशेष न्यायालय को आरोपपत्र मुख्य न्यायिक दण्डाधिकारी को विधिनुसार कार्यवाही करने के लिए प्रतिप्रेषित करने का निदेश दिया गया। (के.एल. साहू वि. म.प्र. राज्य) (DB)...959

Prevention of Corruption Act (49 of 1988), Section 7 & 13(2) – Complainant turning hostile – Effect – **Even if the complainant has turned hostile, part of his statement which supports the prosecution story can be relied on – For proving the offence u/S 7 and 13(1)(d) of the Act, both demand and acceptance need to be proved but if complainant turned hostile, it can also be proved by circumstantial or other oral documentary evidence – Evidence of the hostile witness cannot be rejected merely because he has been declared hostile and such evidence does not become effaced**

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from the record – Relevant portion of evidence of hostile witness can be used at least to corroborate the evidence of other independent witnesses – In the present case, FSL report of hand wash, trouser wash and note wash clearly indicates the recovery of bribe money – Basic ingredients i.e. Demand of bribe, its acceptance and recovery of currency notes, required to prove the offence, stands duly proved beyond reasonable doubt – Ocular testimony of prosecution witnesses has been duly corroborated by the documentary evidence – Based on the facts and evidence, a legitimate presumption can be drawn that appellant has received or accepted the said currency notes on his own volition – Trial Court rightly convicted the appellant – Appeal dismissed. [Rajesh Khatik Vs. State of M.P.] **(DB)...924**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 व 13(2) – परिवादी का पक्षद्रोही हो जाना – प्रभाव – यद्यपि परिवादी पक्षद्रोही हो चुका है, उसके कथनों का वह भाग जो अभियोजन कहानी का समर्थन करता है उस पर विश्वास किया जा सकता है – अधिनियम की धारा 7 एवं 13(1)(डी) के अंतर्गत अपराध को साबित करने हेतु, मांग एवं प्रतिग्रहण दोनों को साबित करने की आवश्यकता है, परंतु यदि परिवादी पक्षद्रोही हो चुका है, तो इसे परिस्थितिजन्य या अन्य मौखिक दस्तावेजी साक्ष्य द्वारा भी साबित किया जा सकता है – पक्षद्रोही साक्षी का साक्ष्य मात्र इसलिए अस्वीकार नहीं किया जा सकता कि उसे पक्षद्रोही घोषित कर दिया गया है तथा ऐसे साक्ष्य अभिलेख पर से मिटने वाले नहीं होते हैं – पक्षद्रोही साक्षी के साक्ष्य का सुसंगत भाग को कम से कम अन्य स्वतंत्र साक्षीगण के साक्ष्य की संपुष्टि करने हेतु उपयोग किया जा सकता है – वर्तमान प्रकरण में, हाथ, पतलून और नोट के धोवन की एफ.एस.एल. रिपोर्ट, स्पष्ट रूप से रिश्वत के रूपये की बरामदगी इंगित करती है – आधारभूत घटक अर्थात् रिश्वत की मांग, उसका प्रतिग्रहण तथा करेंसी नोट की बरामदगी जो अपराध साबित करने के लिए अपेक्षित है, युक्तियुक्त संदेह से परे सम्यक् रूप से साबित होते हैं – अभियोजन साक्षीगण की चाक्षुष परिसाक्ष्य को दस्तावेजी साक्ष्य द्वारा सम्यक् रूप से अभिपुष्ट किया गया है – तथ्य एवं साक्ष्य के आधार पर विधिसम्मत उपधारणा निकाली जा सकती है कि अपीलार्थी ने उसकी स्वेच्छा से उक्त करेंसी नोट को अभिप्राप्त अथवा प्रतिग्रहीत किया है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – अपील खारिज। (राजेश खटीक वि. म.प्र. राज्य) **(DB)...924**

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) r/w Section 13(2) and Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 173(8) & 465(2) **– Revision against dismissal of application for issuance of direction to conduct further investigation with regard to**

his own income from various sources as well as income of family members – Held – Prayer made by petitioner clearly indicates that in guise of further investigation he wants to establish his defence – A public servant accused of being in possession of disproportionate assets is required to establish his defence before trial Court and that the investigating agency is not under an obligation to look into the same – Application devoid of merit dismissed. [Raj Kamal Sharma Vs. State of M.P. through Special Police Establishment (Lokayukt)] (DB)...*58

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) सहपठित धारा 13(2) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 173(8) व 465(2) – विभिन्न स्त्रोतों से अपनी आय के साथ ही परिवार के सदस्यों की आय के संबंध में अतिरिक्त अन्वेषण का संचालन करने के लिए निदेश जारी करने हेतु आवेदन की खारिजी के विरूद्ध पुनरीक्षण – अभिनिर्धारित – याची द्वारा की गई प्रार्थना स्पष्ट रूप से यह दर्शाती है कि अतिरिक्त अन्वेषण की आड़ में वह अपना बचाव स्थापित करना चाहता है – एक लोकसेवक जिस पर कि अननुपातिक आस्तियों को कब्जे में रखने का अभियोग है, उसे विचारण न्यायालय के समक्ष अपना बचाव स्थापित करना अपेक्षित है तथा अन्वेषण एजेन्सी उक्त की जांच–पड़ताल करने हेतु बाध्यताधीन नहीं है – आवेदन गुणदोष रहित होने से खारिज। (राज कमल शर्मा वि. म.प्र. राज्य द्वारा स्पेशल पुलिस इस्टैब्लिशमेंट (लोकायुक्त)) (DB)...*58

***Prevention of Insults to National Honour Act (69 of 1971), Section 2, Explanation 4(1) & 3* – Unfurling/Displaying National Flag upside down – Allegation against Collector – Held – Collector is the highest authority in District and he can't be expected to check beforehand the position of the flag – It was the job of one of his staff for which Collector cannot be held vicariously liable – No prudent person would believe that Collector would unfurl the flag upside down to jeopardize his career and reputation – Further held – When the National Anthem was going on, on being pointed out about the said mistake, Collector rightly continued with the National Anthem and did not tried to stop the National Anthem in the midway – If that was done by the Collector, he would have committed an offence u/S 3 of the Act – No case is made out – Out of such unfortunate lapse, petitioner ventured to such litigation to gain publicity or petitioner may have personal axe to grind against the Collector – To discourage filing of such petitions, cost of Rs. 10,000/- imposed on petitioner – Petition dismissed. [Anand Tiwari Vs. State of M.P.]**

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सेवा विधि – सेवा निवृत्ति पश्चात् न्यायिक कार्यवाही – याची ने 31.01.1991 को 01.02.1991 से प्रभावी अधिवार्षिकी प्राप्त की – राज्य सरकार द्वारा पीपीओ आदेश जारी करने पर पूर्ण पेंशन प्राप्त कर रहा है – उसके विरूद्ध 25.01.1995 को अपराध पंजीबद्ध किया गया – 11.01.1998 को चालान प्रस्तुत किया गया – याची के विरूद्ध दाण्डिक प्रकरण संस्थित करने की तिथि, 6 वर्ष एवं 11 माह पश्चात् की है जो कि पेंशन नियमों के नियम 9(3) के अनुसार अनुज्ञेय नहीं – प्रकरण में न्यायिक कार्यवाहियाँ, संस्थित किये जाने की तिथि को देखते हुए वर्जित है – सरकार पेंशन वापस लेने का निर्णय नहीं ले सकती – मंत्रीमंडल द्वारा उक्त चर्चा को ध्यान में लिए बिना राज्यपाल के नाम से लिया गया निर्णय, नियम 9 की भावना के विपरीत है – पेंशन एक कष्ट से अर्जित लाभ है जो एक कर्मचारी को प्रोद्भूत होता है और "संपत्ति" के स्वरूप का है – संपत्ति के अधिकार को विधि की सम्यक् प्रक्रिया के बिना समाप्त नहीं किया जा सकता – पेंशन वापस लेने का आदेश पूर्णतः

round of litigation held that promotion of petitioner was wrongly denied and such denial is not based on any reason attributed to the petitioner, and at the same time there is no restriction in law for grant of arrears of salary to him, he is entitled to relief of difference of salary – Further held – State should have justified its claim being a welfare State – Petitioner is also entitled to interest on the arrears of salary @ 9% per annum from the date the arrears became due till realization – Petition allowed. [Manohar Lal Vs. State of M.P.] ...*52

सेवा विधि – पदोन्नति की दोषपूर्ण अस्वीकृति – बकाया वेतन – वेतन में अंतर की हकदारी – अभिनिर्धारित – एक बार इस न्यायालय ने मुकदमेबाजी के पूर्वतर दौर में यह अभिनिर्धारित किया कि याची की पदोन्नति गलत रूप से अस्वीकार की गई थी तथा ऐसा अस्वीकार किया जाना किसी ऐसे कारण पर आधारित नहीं है जिसके लिए याची जिम्मेदार हो तथा उसी समय उसको वेतन का बकाया प्रदान करने हेतु विधि में कोई निर्बन्धन नहीं है, वह वेतन में अंतर का अनुतोष पाने का हकदार है – आगे अभिनिर्धारित – राज्य को कल्याणकारी राज्य होने के अपने दावे को न्यायोचित सिद्ध करना चाहिए – याची, बकाया देय होने की तिथि से वसूली होने तक 9 प्रतिशत प्रति वर्ष की दर से बकाया वेतन पर ब्याज प्राप्त करने का भी हकदार है – याचिका मंजूर। (मनोहर लाल वि. म.प्र. राज्य) ...*52

State Bank of Indore (Employees') Pension Regulation, 1955, Regulation 33 – Entitlement of Pension **– Under Regulation 33, workman would not be entitled to pension if an order of punishment of dismissal has been substituted by compulsory retirement unless workman is entitled to pension on superannuation – Order of punishment of compulsory retirement may not entitle the workman for the benefit of pension but the intention of the Tribunal is categorical so as to entitle him to pensionary benefits – The issue, that pension cannot be paid, was neither raised before the Tribunal nor examined at the time of rendering award by Tribunal – Matter remitted back to Tribunal on the point of punishment so as to make the workman eligible for pensionary benefits. [State Bank of India Vs. Vishwas Sharma] (DB)...877**

स्टेट बैंक ऑफ इंदौर (कर्मचारी) पेंशन विनियम, 1955, विनियमन 33 – पेंशन की हकदारी – विनियमन 33 के अंतर्गत, कर्मकार पेंशन का हकदार नहीं होगा यदि पदच्युति की शास्ति को अनिवार्य सेवानिवृत्ति से प्रतिस्थापित किया गया है जब तक कि कर्मकार अधिवार्षिकी पर पेंशन का हकदार न हो – अनिवार्य सेवानिवृत्ति की शास्ति का आदेश कर्मकार को पेंशन का हकदार नहीं बना सकता परंतु अधिकरण का आशय सुस्पष्ट है जिससे कि वह पेंशन लाभों के लिए हकदार हो सके – पेंशन का संदाय न

THE INDIAN LAW REPORTS M.P. SERIES, 2017

(VOL-2)

JOURNAL SECTION

IMPORTANT ACTS, AMENDMENTS, CIRCULARS, NOTIFICATIONS AND STANDING ORDERS.

THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017

NO . 6 OF 2017

[Received the assent of the President on the 27th March, 2017 and published in the Gazette of India (Extraordinary) Part II, Section 1, dated 28.03.2017, Page no. 1-2]

An Act further to amend the Maternity Benefit Act, 1961.

BE it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:—

1. Short title and commencement. *(1)* This Act may be called the Maternity Benefit (Amendment) Act, 2017.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint :

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Amendment of section 3. In the Maternity Benefit Act, 1961 (53 of 1961) (hereinafter referred to as the principal Act), in section 3, after clause (*b*), the following clause shall be inserted, namely:—

'*(ba)* "commissioning mother" means a biological mother who uses her egg to create an embryo implanted in any other woman;'.

3. Amendment of section 5. In the principal Act, in section 5,—

(A) in sub-section (*3*) —

(i) for the words "twelve weeks of which not more than six weeks", the words "twenty-six weeks of which not more than eight weeks" shall be substituted;

(ii) after sub-section *(3)* and before the first proviso, the following proviso shall be inserted, namely:—

"Provided that the maximum period entitled to maternity benefit by a woman having two or more than two surviving children shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery;";

(iii) in the first proviso, for the words "Provided that", the words "Provided further that" shall be substituted;

(iv) in the second proviso, for the words "Provided further that", the words "Provided also that" shall be substituted;

(B) after sub-section (*3*), the following sub-sections shall be inserted, namely:—

"*(4)* A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother, as the case may be.

(5) In case where the nature of work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period and on such conditions as the employer and the woman may mutually agree.".

4. Insertion of new section 11A. In the principal Act, after section 11, the following section shall be inserted, namely:—

"11A. Créche facility. *(1)* Every establishment having fifty or more employees shall have the facility of créche within such distance as may be prescribed, either separately or along with common facilities :

Provided that the employer shall allow four visits a day to the creche by the woman, which shall also include the interval for rest allowed to her.

(2) Every establishment shall intimate in writing and electronically to every woman at the time of her initial appointment regarding every benefit available under the Act.".

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

MADHYA PRADESH OUTDOOR ADVERTISEMENT MEDIA RULES, 2017

[Notification No. 08/F 1-25/2016/1803, Published in the Madhya Pradesh Gazette (Extraordinary) , dated 28th March, *2017, Page no. 264(41) – 264(67)]*

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In exercise of the powers conferred by sub-section (1) of Section 68 read with Section 433 of the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) and sub-section (OO) of Section 124 read with Section

355 of the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), the State Government hereby makes the following rules, namely:-

RULES

CHAPTER-I

PRELIMINARY

1. Short title, Extent and Commencement.-

(1) These rules may be called the Madhya Pradesh Outdoor Advertisement Media Rules, 2017.

(2) They shall come into force from the date of their publication in the Madhya Pradesh Gazette.

(3) These rules shall apply within the limits of all Municipal Corporations, Municipalities and Municipal Councils.

CHAPTER-II

INTERPRETATION AND APPLICATION

2. Definitions.- In these rules, unless the context otherwise requires,-

(a) **"Act"** means the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) and the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961);

(b) **"Advertisement"** means any representation by a word or abbreviation thereof, letter, logo, symbol, sign, figure, painting, drawing or other pictorial representation, light, sound, visible, audible to public from any place on land, building, airspace and water and/or visible from Public Place or Public Street including display on outdoor media devices (OMD) in the Control Area;

(c) **"Advertising"** means the act or process of displaying an Advertisement;

(d) **"Agency"** means an applicant who may be an individual registered charitable organization, firm, partnership etc. or a company incorporated under the Companies Act, 1956/2013;

(e) **"Approved"** means approved in writing by the Competent Authority having jurisdiction under these Rules;

(f) **"Appeal Committee"** means a Committee appointed under Section 403 of Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) or Section 307 of the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961);

(g) **"Billboard/Hoarding"** means an Outdoor Media Device with space for advertising in the form of an advertisement panel and where such panel is mounted on any structure with its foundation either on ground or building.

(h) **"Building Line"** means the line up to which the plinth of a building may lawfully extend on the side, which abuts the street or an extension of a street or a strip of land ear-marked or reserved for future construction of street and such line has been so prescribed in the approved plan or co-ordination plan or the scheme by the Government Authority having jurisdiction;

(i) **"Carriage way"** means the width of the road where vehicles are free to move without any obstruction. Carriage way can be further classified as single or dual carriageway.

(j) **"Competent Authority"** means any officer authorised by the Municipal Authority to implement and enforce the provisions set out in these Rules;

(k) **"Municipal Area"** means the geographic area including airspace in the jurisdiction of the Municipal Area as defined under sub-section (2) of section 7 of the Madhya Pradesh Municipal Corporation Act, 1956 and section 5 of the Madhya Pradesh Municipalities Act, 1961;

(l) **"Display"** means the display of an Advertisement;

(m) **"Election"** means a national, state, local self-government election and by-election held under the superintendence and control of Election Commission of India/State Election Commission;

(n) **"Gantry"** means a structure erected across a road and usually fabricated by metal etc. section pillars fixed on either side of a

road with a beam shaped section connecting the top of the pillars across the road with the advertisement on the face opposite to the direction of traffic;

(o) **"Indian Road Congress (IRC)"** means the applicable Indian Road Congress codes and any regulations made thereunder;

(p) **"Interested Party"** means any person/agency who has in terms of these Media Rules submitted an application or submitted comments or an objection or made representations in respect of any such application;

(q) **"Intersection/Junction"** means an area embraced within the prolongation of the lateral boundary lines of two or more public streets, open to traffic, that join one another at any angle, whether or not one such public road crosses the other;

(r) **"LED/Electronic Hoarding"** means an outdoor media device, with display made from LED or LCD or any other electronic source, to display running text, displays and informational messages from computer programs and software or any other means;

(s) **"Mobile Display Advertisement"** means a double or single sided Outdoor Media Device or panel mounted on or behind a vehicle in a manner that it can be driven around or parked at strategic locations for a better display of the advertisement;

(t) **"Municipal Authority"** means the concerned Commissioner/ Chief Municipal Officer or any other entity notified by the State Government for implementation of these Rules;

(u) **"National Building Code (NBC)"** means the latest National Building Code of India and any regulations made thereunder;

(v) **"Outdoor Advertising"** is advertising that reaches the consumers while they are outside their homes;

(w) **"Outdoor Media Device or OMD"** means device as set out in Rule 5;

(x) **"Owner"** means legal owner of the Private Property;

(y) **"Property"** means any unit of private or public land, water air space including a Public Place which is registered/documented as separate entity/ID and also includes such spaces which are categorized as land, water and airspace or any Public Place;

(z) **"Public Place"** means a space, which is open and/or assigned to the use or enjoyment of the public, whether such space is vested in the Municipal Authority or not;

(za) **"Public Street"** means a road, street or thorough fare or other Right of Way to which the public has a right of access or which is commonly used by the public and includes any portion of a Right of Way of public street including a footpath;

(zb) **"Right of Way or RoW"** means the full width of a Public Street as prescribed by IRC or between Building Lines across such Public Street including the median, carriageway, service road, shoulder and footpath/sidewalk and the air space above it;

(zc) **"Road Traffic Sign"** means any road traffic sign and traffic signal as contemplated in the IRC or any applicable Act/Rules;

(zd) **"Self Advertising"** means a name board whether illuminated or non-illuminated displaying only the name, address and details of any own commercial business or social activity that is being carried out in the same premises or on the shop as the case may be.

(ze) **"Street Furnishing Advertisement"** means an Advertisement Displayed on any public facility or structure which is not primarily intended for Advertising and includes a seating bench, plant box, footpath litter bin, pole-mounted litter bin, public transport shelter, sidewalk clock, suburban name device and a street name, drinking fountain, bollards, traffic barriers, etc. of appropriate size and shape serving the functional requirement of such street furniture with advertisement either directly pasted/affixed or in the form of a panel or painted or written or displayed in any other manner.

(zf) **"Structural Engineer"** means a person with post graduate degree in Structural Engineering from duly recognised Institute/University and Registered/empanelled with Municipal Authority;

(zg) **"Structural Stability Certificate"** means a certificate about

structural safety and stability issued by a Structural Engineer;

(zh) **"Schedule"** means Schedule appended to these Rules;

(zi) **"Temporary Advertisement"** means an Advertisement/Outdoor Media Device displayed for a maximum period of 30 days for any forthcoming event including entertainment events, festivals, mela, trade fair, conferences, road shows, etc.

(zj) **"Urban Design"** means the actions of conceiving and managing the special and aesthetic characteristics of urban space between and around buildings, public places including physical elements that make up the streetscape and the combined visual effect of building facades and other structures.

(zk) **"Vehicle"** includes a bicycle, tricycle, motor car and every wheeled movable conveyance which is used or capable of being used in a public street;

(zl) **"Wall Painting Advertisement"** means an advertisement displayed by painting/writing it directly on the wall or structure of a building or any civil structure.

(zm) **"Wall Wraps"** means advertisement painted/pasted/affixed on surface of the walls of a building, which has been used as architectural feature to cover/form facade/, used as wall of a building.

3. Period of Compliance. -

All Existing Outdoor Media Devices shall comply with these Rules within a period of ninety (90) days from the date of notification of these Rules.

Provided that where Outdoor Media Devices have been installed for a contract period after bidding by the municipal authority, these Rules shall be applicable after the contract period. This provision shall not be applicable if any extension is given in aforementioned contract period.

CHAPTER-III

APPLICATION AND APPROVAL PROCESS

4. Application for Registration.-

(1) In case of Private Properties, only Property Owners shall seek permission for installing an Outdoor Media Device from the Competent Authority by registering themselves with the Competent Authority using online process as laid out in Form-I (the "Registering Entity").

(2) This registration is compulsory for Self Advertisers as well as Property Owners who want to install Outdoor Media Devices on their premises.

(3) Registration shall be valid for a period of ten years from the date of registration for Self-Advertisers and three years for other Property Owners who wish to install Outdoor Media Devices.

(4) The registering entity shall deposit Registration Fee as set out in clause I of Schedule excluding the Self Advertisers.

(5) The Competent Authority shall upon receiving application for registration, reject or accept the same in the format as given in Form-IV.

5. Types of outdoor media devices. -

(1) Outdoor Media Devices shall be classified into following:

Typology	Description
A	OUTDOOR MEDIA DEVICES ON PUBLIC TRANSPORT SERVICES/STREET FURNITURE
A1	Bus and Intermediate Public Transport (IPT) Shelters
A2	Bus and Intermediate Public Transport (IPT) Route Markers
A3	FOB, Gantry, Toilet Blocks And Urinals etc.
A4	Cycle Stands
A5	Police Booth, Parking Booth, Telephone Booth, Pre-

	Paid Taxi Booth, Bus/Rail Booking Information Booth, Drinking Water Facility, Vending Kiosks, Outside Colonies To Facilitate Directory/Payment of Bills, Bollards, etc.
A6	Sitting Bench, Garbage Bins, etc.
A7	Information Panels, Pole Mounted MUPI (Street Furnishing for Information)
A8	Pier or Pylon Mounted Device
B	ADVERTISING – OUTDOOR MEDIA DEVICE ON PUBLIC TRANSPORT SERVICES
B1	Metro/MRTS Infrastructure
B2	Public Transport Vehicle
C	OUTDOOR MEDIA DEVICES ON COMMERCIAL ADVERTISING STRUCTURES ON PUBLIC LAND
C1	Unipole/Hoarding/Billboard
C2	Wall Wrap
C3	Wall Painting/Writing
D	OUTDOOR MEDIA DEVICES ON COMMERCIAL ADVERTISING STRUCTURES ON PRIVATE LAND
D1	Unipole/Hoarding/Billboard
D2	Wall Wrap
D3	Wall Painting/Writing
E	TEMPORARY EVENTS
F	LANDSCAPE OUTDOOR MEDIA DEVICES
G	SHOP SIGNAGE
H	INNOVATIVE ADVERTISING

I CINEMA ADVERTISING-IN-CINEMA ON SCREEN ADVERTISING INCLUDING SLIDES AND ADVERTISEMENT FILMS (MOVING ADVERTISEMENTS)

J INSIDE ADVERTISEMENT COMMERCIAL BUILDINGS AND PUBLIC BUILDINGS

(2) The supporting structure shall have a non-reflective finish to prevent glare. The Outdoor Media Devices structure shall be well maintained at all times. It shall be painted in colours that are consistent with, and enhance the aesthetics of surrounding.

(3) The OMDs which is not defined in Formats of Outdoor Media Devices [Rule 13(1)] and not among the prohibited ones will be considered as "Innovative Advertising".

6. Approval of outdoor media devices (on private land.).-

(1) Application for any Private Property shall be made by submitting information as per Form-II by any Property Owner/Applicant (as applicable).

(2) The application form shall be accompanied with the following -

(a) Applicable Processing fees shall be as per Schedule;

(b) No dues certificate from the Municipal Authority in relation to property for which application has been made;

(c) A drawing showing the locality plan, marginal open spaces (MOS), details of road inventory, in colour, indicating the proposed position (including GPS coordinates) of the Outdoor Media Device and the distances in relation to any other structures, buildings, Outdoor Media Devices situated within a radius of 25m from the proposed Outdoor Media Device.

(d) Where applicable, indicate in terms of these Rules/the Advertisement Zoning Map/Master Plan the category of the proposed location of the Property upon which the Outdoor Media Device is to be installed;

(e) Complete specifications and drawing showing the dimensions of

the Outdoor Media Devices and location,

(f) The design and the structure shall be certified by a Structural Engineer with respect to the safety and stability aspect from the point of view of its foundations which can bear extreme wind conditions, earthquakes, soil bearing capacity and shall comply with prevalent Building Bye laws and National Building Code of India (NBC), Standards and Guidelines framed from time to time under these. The details shall include size of all components of supporting frameworks, anchorages and design calculations including proof of compliance with any other law, including but not limited to, the applicable acts and codes/guidelines.

(g) If a proposed Outdoor Media Device is to be attached to, or Displayed on, the Facade of a building, the approved building plans along with measurement and the details, measurements and position of the proposed Outdoor Media Device and the details and the position of every existing Outdoor Media Device on the building drawn to a scale acceptable to the Competent Authority; and

(h) Any other updated information in the application form (Form-III) which the Competent Authority may require from time to time after approval of Municipal Authority.

(i) Self certification regarding that the property is not in any prohibited zones for the purpose of advertisement.

(3) The Competent Authority may refuse to accept an application if-

(a) Any requirement of sub-rule (2) of Rule 6 has not been complied with; or

(b) The application relates to an Outdoor Media Device which is prohibited in terms of Rule 14.

(c) For any other reason(s), for which Competent Authority considers that it is not in public interest.

(4) If any information requested by the Competent Authority in terms of sub-rule (2) of Rule 6 above is not provided within Thirty (30) days from the date of the first written request, the application

concerned shall be rejected without further notice to the applicant.

7. **Evaluation and approval.-**

(1) While evaluating an application in terms of Rule 4, the Competent Authority shall ensure that the application is in compliance with these Rules. The Competent Authority may accept or reject any application after giving due opportunity of hearing.

(2) An approval shall be for a period as set out below:

Typology	Description	Period
A	OUTDOOR MEDIA DEVICES ON PUBLIC TRANSPORT SERVICES/ STREET FURNITURE	EQUAL TO THE AGREEMENT PERIOD BETWEEN THE COMPETENT AUTHORITY AND THE OWNER/ AGENCY
B	ADVERTISING-OUTDOOR MEDIA DEVICE ON PUBLIC TRANSPORT SERVICES	EQUAL TO THE AGREEMENT PERIOD BETWEEN THE COMPETENT AUTHORITY AND THE OWNER/ AGENCY
C	OUTDOOR MEDIA DEVICES ON COMMERCIAL ADVERTISING STRUCTURES ON PUBLIC LAND	3 YEARS
D	OUTDOOR MEDIA DEVICES ON COMMERCIAL ADVERTISING STRUCTURES ON PRIVATE LAND	3 YEARS
E	TEMPORARY EVENTS	AS PER EVENT DURATION
F	LANDSCAPE OUTDOOR MEDIA DEVICES	AS PER AUTHORISATION

		PERIOD
G	SHOP SIGNAGE	3/10 YEARS*
H	INNOVATIVE ADVERTISING	AS PER AUTHORISATION PERIOD
I	CINEMA ADVERTISING-IN-CINEMA ON SCREEN ADVERTISING INCLUDING SLIDES AND ADVERTISEMENT FILMS (MOVING ADVERTISEMENTS)	3 YEARS
J	INSIDE COMMERCIAL BUILDINGS AND PUBLIC BUILDINGS	3 YEARS

*For self advertisement 10 years and for other signages 3 years.

(3) The Competent Authority shall within fifteen days in writing and lectronically send Letter of Intent (LOI) to the applicant as per format attached as Form-V.

(4) The Owner/Agency shall be required to make necessary payment as specified in the Letter of Intent within fifteen days from date of issue of Letter of Intent.

(5) Upon receipt of necessary payment from the Owner/Agency, the Competent Authority shall issue formal approval letter stating the terms and conditions of the approval.

(6) No approval granted in terms of these Rules shall exempt-

(a) any person from any provisions of any other law applicable to Advertising; or

(b) any Owner/Agency of an Outdoor Media Device from the duty to ensure that such Outdoor Media Device is designed, erected, completed, displayed and maintained in accordance with the provisions of these Rules and any other applicable law including safety and security of public at large.

8. Withdrawal and amendment of approvals.-

(1) The Competent Authority may, withdraw an approval granted in terms of Rule 7 or amend any condition or impose a further condition in respect of such approval, if in the opinion of the

Competent Authority, the Outdoor Media Device concerned-

(a) is or has, as a result of a change to the nature of the environment or the amenity of the neighbourhood, streetscape or Urban Design existing at the time of such approval, become detrimental to the area in which it is located by reason of its size, intensity of illumination, quality of design, workmanship, material or its existence;

(b) constitutes, or has become, a danger to any person or Property or traffic safety;

(c) is obscuring any other Outdoor Media Device, natural feature, architectural feature or visual line of civic, architectural, historical or heritage significance;

(d) of which a part or whole falls either due to an accident or any other cause;

(e) any addition or alternation is made to the building or structure and such addition or alteration involves disturbance of the Outdoor Media Device or any part thereof; and

(f) which is installed on building or structure or property upon or over which the Outdoor Media Device installed is, demolished or destroyed.

(g) If in case of property tax and other Municipal dues related to the property are not paid in due time.

(2) The Competent Authority shall in writing notify the Owner/Agency of the Outdoor Media Device concerned of its decision and that he or she may within fifteen (15) days from the date of the serving of notice as per the rules make written representations concerning the proposed decision.

(3) In case of partial or complete withdrawal of permission by Competent Authority, Property Owner shall have to remove or amend as the case may be, within 7 days the Outdoor Media Device at his own risk and cost and refund of the balance amount of license fee shall be given to the Property Owner within 30

days of such complete withdrawal.

CHAPTER-IV

IMPLEMENTATION MECHANISM FOR MUNICIPAL AUTHORITY

9. Outdoor media devices on municipal authority property.-

(1) Municipal Authority shall constitute a dedicated cell for outdoor media management and appoint a Competent Authority. Competent Authority from time to time shall identify locations and Property(ies) within notified urban planning area, where it will allow new Outdoor Media Devices to be erected and prepare an implementation and monitoring plan.

(2) As and when required such identified locations would be bid out through an open, transparent, competitive e-tendering process for selection of suitable agency (ies).

(3) Competent Authority appointed by Municipal Authority shall prepare outdoor advertisement zoning/master plan and shall categories the outdoor media in clusters/zones and shall identify projects (sites) and implement as follows;

(a) Under Public Private Partnership (PPP) structure, and if not viable under PPP then

(b) Under Advertisement Rights/License model.

(c) Any other Revenue Model.

(4) In terms of the identified implementation structure above, each category of projects would be bid out through an open, transparent e-tendering process by the Competent Authority.

10. Outdoor media devices on the premises of other public authorities.-

(1) Advertisement or Outdoor Media Devices visible/audible from or fronting any public place which is not in the premises of Central/ State Government or it's undertaking, etc., whether installed/ displayed by themselves or by private agencies appointed by them

will be governed as per provisions of these Rules.

(2) For permission of Outdoor Media Devices on Central/State Government or it's undertaking, etc., premises visible/audible from or fronting any public place which is not in the premises of Central/ State Government or it's undertaking, the agency must register to the concerned Competent Authority in the prescribed manner set out in these Rules after obtaining NOC from the respective Authority.

(3) The concerned Central/State Government or it's undertaking are required to provide the names of agencies as covered in sub-rule (1) and (2) of Rule 10, location, size, period of allotment and all other details of the Outdoor Media Devices on their premises.

(4) The demand notices for licence fee as per the relevant Typology will be sent to the concerned agency as per Schedule of these Rules and the agency shall deposit the said amount within 15 days to Competent Authority.

(5) Responsibility of removal of OMDs as per specific direction of any Hon'ble Court or when approval on OMDs is revoked by Competent Authority shall, however, lie upon the Central/State Government or it's undertaking.

(6) For the agencies covered under this Rule 10, all the provisions of these Rules shall be applicable.

11. Advertisement license fees. -

As per the provision of Section 132 and 133 of Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) and Section 129 of Madhya Pradesh Municipality Act, 1961 (No. 37 of 1961) Municipal Authority have been empowered to impose Taxes and Fees.

(1) The Advertisement License Fees including revenue share shall be payable by the Owner/Agency who has been permitted/awarded the contract in terms of the Schedule of these Rules in advance on a quarterly basis or as per provision of the contract decided by the Competent Authority.

(2) No new Advertisement shall be allowed to Display unless the Advertisement License Fees in advance as per condition of approval is deposited with the Competent Authority.

(3) In addition to the license fee, the registered entity shall deposit bank guarantee as a performance guarantee of an amount equivalent to the quarterly license fee payable to the Competent Authority or as per provision of the contract decided by the Competent Authority in advance valid for entire licence period.

(4) Any person dissatisfied with the order passed by the Competent Authority under these Rules may appeal to the "Appeal Committee" appointed by the Municipal Authority and decision of the committee shall be final provided that no appeal shall be valid unless the amount of the tax and/or fee payable has been deposited.

12. Assignment of license fees. -

The advertisement license fee collected by the Municipal Authority under these Rules shall be assigned for operational Urban Public Transport System. This assignment shall not be less than 25% of the total revenue received under these Rules. In Municipal Areas where Urban Public Transport System is still to be implemented then these provisions shall be applicable from the date of Urban Public Transport System coming into operation.

CHAPTER-V

GENERAL REQUIREMENTS, EXEMPTIONS AND PROHIBITIONS

13. General requirements for outdoor media devices. -

(1) The Owner of an Outdoor Media Device shall ensure adherence to these Rules.

(2) The Owner of an Outdoor Media Device must ensure that such device is designed or located so as not to-

(a) be detrimental to the nature of the environment, streetscape, Urban Design or detract from the architecture of any building on which or where such device is to be located, by reason of abnormal

size, appearance, workmanship, design or its existence etc;

(b) wholly or partially obscure any Outdoor Media Device previously installed;

(c) constitute a danger to any person or property or traffic safety;

(d) project outside the boundaries of the property on which it is to be erected or displayed;

(e) result in the removal of, or damage to, any tree in a public place without prior approval of the Competent Authority;

(f) be unsightly and not to comply with minimum distances as prescribed in these Rules;

(g) obstruct a fire escape or the means of access to a egress from a fire escape; or comply with the minimum clearance with regard to overhead power lines stipulated in prevalent Law/Rules.

(3) Any Outdoor Media Device on a Public Street or facing a Public Street, including Outdoor Media Devices facing a State or National Highway, shall comply with the following requirements:

(h) a minimum distance of as set out in the Chapter-VIII shall be maintained between Outdoor Media Devices or Advertisements on the same side of a Public Street including any carriageway, whether, State of National Highway; and

(i) No Outdoor Media Device may be located inside a prohibited areas and in relation to overhead Road Traffic Signs.

(4) Any Outdoor Media Device must be positioned as per the provision of IRC in case of an Intersection and in any case traffic flow may not be impeded during the erection and maintenance of an Outdoor Media Device located in a Public Street, provided precaution has been arranged and prior approval has been obtained from the Competent Authority.

(5) Upon approval of an Outdoor Media Device, it shall not be altered, amended, removed, re-erected or upgraded without prior written approval of the Competent Authority, except for maintenance work, which may be required for the upkeep of an

Outdoor Media Device.

(6) Only sites approved by the Competent Authority in terms of these Rules for the purpose of advertisement shall be used for display of advertisements.

14. Exempted outdoor media devices and advertisements. -

The following Outdoor Media Devices and Advertisements are exempted from compliance with the provisions of Rule 4, but must comply with any other applicable provision of these Rules and other applicable Laws:

(a) is exhibited within the window of any building if the advertisement relates to the profession or business carried on in that building;

(b) relates to the name of the land or building upon or over which the advertisement is exhibited, or to the name of the owner or occupier of such land or building; or

(c) relates to the business of a central/state government organisations and is exhibited within or upon any wall or other property of the concerned organisations within premises; or

(d) is a name plate announcing the name of owner/or name of occupier of building and/or name of a building upon which such advertisement is so fixed, exhibited painted, pasted, retained or displayed; or

(e) in the case of buildings/property, where professional services like chartered accountant, advocate, architect, etc., is running, as permitted by law and is within permissible limits in these Rules.

15. Prohibitions.-

No approval shall be given for

(f) Outdoor Media Devices displaying Negative Advertisements as described in Chapter IX; and

(g) Proposed to be located in Prohibited Areas, as described in Chapter IX or notified by different Competent Authorities.

CHAPTER-VI

MONITORING MECHANISM

16. IT based solution for application, renewal and monitoring. -

(1) Competent Authority shall adopt a transparent system for grant of permission for display of outdoor advertisements and monitoring of the same. The Competent Authority shall adopt preferably the Information Technology based Implementation and Monitoring System, prepared as per the guidelines of the State Government for such approvals and monitoring. The Competent Authority shall prepare a GPS based Outdoor Media Master Plan for the area under the jurisdiction of the Competent Authority, all the existing and proposed OMDs with their GPS coordinates shall be marked on the GPS map of the respective Competent Authority and the same shall be available on the Website of the respective Competent Authority.

(2) The system as mentioned in sub-rule (1) above shall have following salient features:

(a) Outdoor Media Rules and all notifications related to Outdoor Media shall be made available to general public by means of display of information on the Website of the respective Competent Authorities.

(b) Online registration of entities may be enabled. The Registering Entities shall be assigned a unique ID, which shall be password protected for all future correspondence with the Competent Authority in matters related to Outdoor Media.

(c) All applications for the installation of Outdoor Media shall as far as possible be submitted online;

(d) Each Outdoor Media site shall have unique code assigned to it which shall convey its ownership, location (GPS coordinates), type of media, size (area of display), advertisement/license fee payable, validity of Agreement for display of advertisement and any other information which in the opinion of the Competent Authority is required to be coded.

(e) Approvals of all OMD may also be given electronically by the Competent Authority.

17. Inspection. -

(1) Competent Authority shall have the power to inspect any Outdoor Media Device for the purpose of implementation and enforcement of these Rules. Competent Authority may also authorise any official of Municipal Authority to carry out such inspection.

(2) The Competent Authority or any official authorised by the Competent Authority, before the commencement of, or during an inspection in terms of sub-rule (1) of Rule 16, at the request of the Owner of an Outdoor Media Device or the Owner of a Property on which the Outdoor Media Device concerned has been installed or is displayed, produce written confirmation of his or her appointment as an authorised official empowered to carry out inspections for the purposes of these Rules.

18. Maintenance of outdoor media devices and removal of unauthorised advertisements. -

(1) Subject to provisions in these Rules:

(a) The Owner/Agency is responsible for maintaining the OMD and the surrounding area so that it does not become unsightly or deteriorate to such a degree that it is in conflict with any provision of these Rules. Owner/Agency shall also be responsible for structural safety of the OMD and in case of any accident the owner shall be held liable for any mishap.

(b) An Owner/Agency contemplated in paragraph (a), must carry out at least once in three (3) months inspection of an Outdoor Media Device with a view to satisfying himself or herself that it has been properly maintained and forthwith carry out any necessary maintenance resultant upon such inspection. At the end of the year, the owner shall submit such inspection reports to the Competent Authority.

(c) The Owner/Agency shall ensure that a metallic plate (minimum size of 1 feet by 1 feet) or IT enabled device with the embossed logo of the Competent Authority providing details of the Outdoor Media Device, are displayed and maintained in good condition at all times. Failure to do so shall result in imposition of penalty

amounting to 10% of the annual license fee.

(2) If in the opinion of the Competent Authority, any Outdoor Media Device is in a dangerous or unsafe condition or has been allowed to fall into a state of disrepair or is in conflict with any requirement of these Rules, Competent Authority shall serve a notice on the Owner/Agency to remove/maintain the Outdoor Media Device, within a period so specified and Owner/Agency shall be required to comply thereof within stipulated time,

(3) If the OMD or advertisement is unauthorised or the Competent Authority is of the opinion that an Outdoor Media Device constitutes an imminent danger to any person or Property, the Competent Authority shall without serving a notice in terms of sub-rule (2) of Rule 17, or if such a notice has been served but not complied within the period specified therein, remove/maintain the Outdoor Media Device.

(4) The cost incurred for the removal and storage of an Outdoor Media Device, and any other costs incurred by the Competent Authority as contemplated in sub-rule (3) of Rule 17, shall be recovered from the Owner/Agency. The Competent Authority shall remove the OMD at the risk and cost of the Owner/Agency.

(5) If an Outdoor Media Device has been removed in terms of sub-rule (4) of Rule 17, Competent Authority shall promptly in writing give a notice of such removal to the Owner/Agency.

(6) Any Outdoor Media Device, which has been removed and/or stored in terms of these Rules, shall be released to its Owner/ Agency subject to payment of prescribed fee/charges as determined by the Competent Authority within a period of maximum three months. After a period of three months the Competent Authority shall be free to auction or dispose the said OMD by transparent process and proceeds received shall be treated as Municipal Authority fund.

(7) The Competent Authority shall remove an unauthorised outdoor advertisement promptly and the Competent Authority shall immediately dispose of such advertisements/structures on, as is where is basis. The Competent Authority shall prepare and

implement adequate process for such removal and disposal, from time to time.

19. Documentation.-

(1) The Owner/Agency of a Property upon which an Outdoor Media Device is erected, attached or Displayed, must retain certified copies of all documentation relating to the application for approval of such device and the approval of the Competent Authority in terms of these Rules, as long as that device is erected or displayed, and must present such documentation to Competent Authority or any other duly authorised official by the Competent Authority at any point of time.

CHAPTER-VII

MISCELLANEOUS

20. Serving of notices. -

Any notice that is required to or may be served, delivered or given in terms of or for the purposes of these Rules, must be served in any one of the following ways:

(a) by sending a copy of the notice by registered or under postal certificate to the last- known address of the Owner/Agency and unless the contrary is proved, it is deemed that service was effected on the seventh day following the day on which the document was posted:

(b) by faxing a copy of the notice to the person, if the person has in writing furnished a fax number to the Government Authority or an authorised official;

(c) by sending the notice through e-mail on the registered e-mail id.

(d) by handing over a copy of the notice to any of the authorised representative/owner;

21. Appeals.-

Any Owner/Agency whose rights are affected by a decision of Competent Authority in terms of or for the purposes of these Rules, may appeal against that decision to the "Appeal Committee" appointed by the

Competent Authority in terms of the Section 403 of the Madhya Pradesh Municipal Corporation Act, 1956 or Section 307 of the Madhya Pradesh Municipalities Act, 1961, by lodging an appeal, specifying the grounds of appeal within thirty days of the date on which he or she was communicated of that decision.

CHAPTER-VIII

GENERAL PERMISSION CRITERIA – OUTDOOR MEDIA DEVICE

22. Offences and penalties.-

(1) The Competent Authority shall impose penalty for below mentioned violations under these Rules,-

Sr. No.	Type of Violation	Penalty
1	*Violation in size, type, location, payment etc. of authorised OMD by registered entity.*	1. In case of first violation related to any OMD, the penalty shall be Rs. 5/per Sqft/per day or equal to applicable licence fee as per relevant typology as prescribed in Schedule, whichever is more from the date of violation and subject to condition that the said violation is removed or corrected within 15 days. 2. In case of second/continuing violation beyond 15 days, the entire building/property shall be debarred from display of advertisements for a minimum period of one year and bank guarantee shall be forfeited along with forceful removal of OMD.
2	*Unauthorised/illegal Media installed*	Rs. 10/- per Square feet of OMD per day or double the applicable

licence fee as per relevant typology as prescribed in Schedule, whichever is more to be charged for a minimum period of 30 days or for the period of actual display, whichever is higher and along with forceful removal of OMD.

(2) The penalty imposed under sub-rule (1) of Rule 21 shall be deposited by the defaulter within seven days of receipt of the notice as issued by the Competent Authority, failure to do so shall attract an interest of @ 12% per annum calculated on the number of days beyond the seventh day till the receipt of payment by the Competent Authority.

(2) In case more than Three separate independent instances of violation of OMD in terms of sub-rule (1) of Rule 21 occur with the same Owner/Agency, this shall lead to blacklisting of the Owner/Agency including its Directors/Members for a period of three years. Due to aforesaid blacklisting of the Owner/Agency and Directors/Members, other OMD/s with the same Owner/Agency shall automatically become unauthorised. Application as a new case can be made after the period of blacklisting as per these Rules.

23. Insurance.-

The Owner of the Outdoor Media Devices shall be liable to insure against public liability under such Outdoor Media Device.

24. **Indemnity.-**

(1) Outdoor Media Device Owner shall be required to indemnify the Competent Authority for the designated Outdoor Media Devices and activities against all actions, proceedings, claims, demands, costs, losses, damages and expenses etc. which may be brought against, or made upon the Competent Authority which arise as a result of the installation or existence of an Outdoor Media Devices.

(2) The Outdoor Media Device Owner/Agency shall always be responsible for any injury or damage caused or suffered by any person or property arising out of or related to the display of advertisement and the consequential claim shall be borne by the Advertiser who will also indemnify and safeguard the Competent Authority in respect of any such claim or claims.

25. Powers of State Government.-

The State Government can issue details/clarifications/amendments/ notifications/guidelines with respect to these Rules from time to time as the need be.

26. Permission criteria.-

(1) In cities with population more than 5 lakhs, on ground Billboards shall be mounted on single pole only (Unipole).

(2) No Outdoor Media Device shall be attached in any way to trees or shrubs.

(3) No trade and business sign, messages, posters or printed material of any nature shall be attached/pasted onto any supporting column, pillar or post.

(4) Outdoor Media Device in any form shall not obstruct any pedestrian movement (vertically and laterally), fire escape door or window openings.

(5) No Outdoor Media Device shall be in any form or manner interferes with openings required for light and ventilation as prescribed in prevalent Building Bye Laws.

(6) Under no circumstances shall Outdoor Media Device be located to obstruct or alter the frontal silhouette of any transparent/translucent surfaces/openings.

(7) No trade and business sign shall be in any form or manner interferes with fire safety transit/exit space requirements and prescribed norms.

(8) Materials used on all Outdoor Media Devices should be

non-polluting and fire resistant.

(9) Any new Outdoor Media Device shall consider existing Outdoor Media Devices on a building, site or adjoining streetscape to ensure that the Outdoor Media Device does not give rise to visual and/or physical clutter.

(10) Outdoor Media Devices shall have no projections from any building.

(11) The cabling and conduit should be concealed from view of the sign/Outdoor Media Devices and any supporting structure from all angles, including visibility from the street level and nearby higher buildings and against the skyline.

(12) No Outdoor Media Devices under any circumstances shall be supported from, hung or placed on other signs. Each Outdoor Media Devices should be self-supporting or fixed securely with the architectural structure.

(13) Outdoor Media Devices suspended from the roof at the roof level are not permitted.

(14) Where subordinate information is allowed, the name or use of the business shall be the dominant message on the Outdoor Media Devices- No supplementary (as in bylines, product specifications, selling propositions) and subordinate information (addresses, telephone numbers, and other such details) which seeks the attention of drivers along vehicular stretches will not be allowed as they present a traffic hazard.

(15) Outdoor Media Devices should be non reflective such that they do not flash or glare at drivers on the streets.

(16) All permitted Outdoor Media Devices would attract levies payable as outlined by the Competent Authority.

27. Traffic hazard potential dependencies.-

(1) The traffic hazard potential of an Outdoor Media Device depends on its:

(a) Site Location: Outdoor Media Device's location from the

road, which is measured in terms of lateral and longitudinal displacements from the edge of the road. The hazards generally diminishes further the device is away from the road.

(b) Size of the Outdoor Media Device,

(c) Luminance level of the Outdoor Media Device, and

(d) Background and other such related issues.

(2) An Outdoor Media Device may be considered a traffic hazard-

(a) If it interferes with road safety or traffic efficiency.

(b) If it interferes with the effectiveness of a traffic control device (e.g., traffic light, stop or give way sign).

(c) Obscures a driver's view of a road hazard (e.g., at corners or bends in the road).

(d) Imitates a traffic control device.

(e) Is a dangerous obstruction to road or other infrastructure, traffic, pedestrians, cyclists or other road users.

(f) Obscure any existing and legally erected Outdoor Media Devices;

(g) If it is in the declared dangerous (partly or fully) or has been issued with the notice under the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) or Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961);

(h) If it violates the building by-laws of Municipal Corporation/ Municipality/Municipal Council;

(i) If it is against the public interest;

28. Site selection criteria.-

(1) Lateral Placement -

(i) Unipole/Hoarding shall not be permitted on traffic

islands.

(ii) Where carriageways diverge so much that oncoming traffic is not visible because of topography or dense vegetation.

(iii) Unipole/Hoarding should not be permitted:

(a) in medians

(b) on traffic junctions where carriageway diverge

(c) on footpaths

(d) where footpath doesn't exist Unipole/Hoarding shall not be permitted within 3 meter of existing carriageway.

(e) where footpath exist Unipole/Hoarding shall not be permitted within 3 meter from the edge of the footpath.

(f) on roads where service road/lane exists, the Unipole/ Hoarding shall not be permitted within 3m from the edge of the service road/lane.

(2) Longitudinal Placement (Driver Distraction Control) -

The minimum distance between two Unipole/Hoarding on the same side of the road shall not be less that 50 meter.

29. **Development criteria.-**

(1) Apart from accommodating vehicular and pedestrian traffic, road reserves are corridors for utility services such as power, telecommunications, gas, storm water, water supply and sewerage. The Agency/Advertiser or the licensee is responsible to co-ordinate, inform and communicate to relevant authorities before any excavation or fabrication on site work is to be undertaken. Any liability, delay or accident that happens, is complete responsibility of the Owner/ Agency.

(2) Outdoor Media Device Owner/Agency are solely responsible for ensuring that during erection, maintenance,

alteration and operation of an Outdoor Media Device, the device does not conflict with services or other things within the road reserve.

(3) The Competent Authority may ask the Owner/Agency to either replace or altogether remove any Outdoor Media Device to facilitate the work undertaken by utility services such as power, telecommunications, gas, storm water, water supply and sewerage, or for road widening.

30. Physical characteristics.-

The application of control on physical characteristics is intended to minimize the level of driver distraction. Control of the physical characteristics of Outdoor Advertising Devices shall relate to the:

(a) Size and shape

(b) Colour

(c) Illumination

(d) Outdoor Media Device Content

(e) Legibility

(f) Structure

(g) Electrical Connection

(a) Size and Shape-

Outdoor Media Devices shall not use shapes that could potentially result in an Outdoor Media Device being mistaken for the effectiveness of official traffic signs.

(b) Colour-

Outdoor Media Devices shall not use colour combinations that could potentially result in and being mistaken for an official traffic sign.

(c) Illumination -

(1) Outdoor Media Device shall not contain flashing red, blue or amber point light sources which, when viewed from the

road, could give the appearance of an emergency service or other special purpose vehicle warning lights.

(2) All lighting associated with the Outdoor Media Device shall be directed solely on the Outdoor Media Device and its immediate surrounds.

(3) External illumination sources shall be shielded to ensure that external 'spot' light sources are not directed at approaching motorists.

(4) Illumination of Outdoor Media Device is to be concealed or be integral part of it.

(5) Up-lighting/upward pointing of the Outdoor Media Device shall not be allowed, any external lighting is to be downward pointing and focused directly on the Outdoor Media Device to prevent or minimise the escape of light beyond Outdoor Media Device.

(6) Any light source shall be shielded so that glare does not extend beyond the Outdoor Media Device.

(7) Non-static illuminated Outdoor Media Device (with flashing lights) are not permitted.

(d) Outdoor Media Device Content-

The Municipal Authority will generally rely upon self regulatory controls within the Advertising industry to enforce minimum Advertising standards. Notwithstanding this approach, the Competent Authority may take action to modify or remove any Outdoor Media Device that contravene the Advertising Industry's Code of Ethics, (refer List of Negative Advertisements provided in chapter II) or that otherwise causes a traffic hazard.

(e) Legibility-

(1) For all categories of Outdoor Media Devices (other than OMDs which are directed at pedestrians), text elements on an Outdoor Media Device face should be easily discernible to traveling motorists. This will minimise driver distraction.

(2) The content or graphic layout exhibited on Outdoor Media Device panel shall avoid hard-to-read and overlay intricate typefaces and have letters styles that are appropriate and is not detrimental to the smooth flow of traffic and distracting to the driver.

(3) All Outdoor Media Devices shall be so designed as to maintain a proportion where, as a general rule, letters should not appear to occupy more than 20% of the Outdoor Media Device area, unless otherwise permitted by the Competent Authority.

(f) Structure-

(1) A Structural Engineer practicing in the field of structural engineering shall certify Outdoor Media Device structures and also the building on which Outdoor Media Device is installed. This requirement is not applicable to specific instances where the Outdoor Media Device is in the form of Advertisement pasted directly to the surface of a structure e.g. pasted sticker on a vehicle, wall wrap, etc.

(2) This certification confers compliance of the design with relevant Indian Structural Design Standards, Codes of practice and conditions of these Rules. The foundations shall be designed and checked for extreme wind conditions, earthquake, soil bearing capacity, etc.

(3) The Structural Engineer shall be accountable in case of any structural disability and safety of the Outdoor Media Devices and the building on which Outdoor Media Device is installed. Certified structural engineer should do the annual audit of the structure and report should be submitted to competent authority.

(4) The supporting structure shall have a non-reflective finish to prevent glare.

(5) The Outdoor Media Device structure shall be well maintained. It shall be painted in colours that are consistent with and enhance the aesthetics of surrounding area.

(6) Official road furniture such as official signs and delineator guideposts shall not be used as the supporting structure of an Outdoor Media Device.

(7) The name of the Outdoor Media Device license holder/ license number/media device identification number/license period, etc., shall be placed in a conspicuous position on the Outdoor Media Device.

(g) Electrical Connection-

(1) Electrical connections to Outdoor Media Devices shall accord with relevant Indian Standards.

(2) Electrical connections to Outdoor Media Devices shall be designed to ensure there is no risk to safety or traffic.

(3) Electrical connections to Outdoor Media Devices shall be designed to be safe in the event of accidental knock down.

(4) As constructed, certification shall be supplied immediately following installation and connection.

(5) The Owner/Agency of the Property is the power consumer and shall make application for power connection and shall obtain electricity connection from the respective distribution company/agency for illuminated display at each site in his own name, for which Competent Authority would provide him necessary no objection certificate on his specific request.

(6) Any charges for power connection and supply shall be incurred directly by the Owner/Agency. A copy of the electricity supplier's letter of acceptance/billing arrangement shall be provided to the Competent Authority before entering into formal license agreement.

(7) The electrical installation work shall be performed by a licensed electrical worker in accordance with the relevant Electricity Regulation and the Wiring Rules and as per the relevant electricity suppliers.

(8) Adequate insulation and protection equipment and procedures shall be in place to protect maintenance and

service personnel working on either the Outdoor Media Device or the road lighting circuit. For earthing, a separate earth electrode shall be used, and active and neutral conductors shall be used only for supply from the supply point.

(9) A sketch plan shall be submitted to Competent Authority showing the location from where the electricity is being drawn along with position of various other ancillary requirements, duly signed by a qualified electrical engineer practicing in same field.

(10) A copy of the electrical contractor's test certificate shall be provided to the Competent Authority. The switching device shall be of a type approved by the electricity supplier. Electrical components shall be in accordance with relevant Indian Standards.

CHAPTER-IX

INDICATIVE LIST OF PROHIBITED AREAS AND NEGATIVE OUTDOOR ADVERTISEMENT

31. Prohibited areas.-

No Advertisements or Outdoor Media Devices shall be allowed in the following areas:

(1) In front or/inside the compound of/on the walls of any-

(a) Building of archaeological, architectural, aesthetically, historical or heritage importance;

(b) Statues, minarets or pillars of heritage importance;

(c) Educational institutions;

(d) Traffic Islands.

(2) In exceptional circumstances, the Municipal Authority in consultation with the relevant authority would consider applications on a case-by-case basis. For example – for tourist service/accommodation businesses, Outdoor Media Devices may be permitted as part of a regional tourist plan.

(3) The Municipal Authority has the power to add the specific area in Prohibited List of Area for Outdoor Media Device.

32. List of negative advertisements.-

The advertisement consisting/exhibiting any one or more of the following shall be deemed to be negative advertisement for the purpose of these Rules.

(a) Nudity;

(b) Racial or communal or propagating caste, community or ethnic difference;

(c) Promoting drugs, alcohol, cigarette or tobacco items;

(d) Propagating exploitation of women or child;

(e) Sexual overtones;

(f) Depicting cruelty to animals;

(g) Depicting anti national activities;

(h) Casting aspersion on any brand or person;

(i) Advertisement banned by any law;

(j) Glorifying violence;

(k) Destructive devices and explosives depicting items;

(l) Weapons and related items (such as firearms, firearm parts and magazines ammunition etc.);

(m) Which may be defamatory, trade libelous, unlawfully threatening or unlawfully harassing;

(n) Which may be obscene or contain pornography or contain an "indecent representation of women" within the meaning of the Indecent Representation of Women (Prohibition) Act, 1986;

(o) Linked directly or indirectly to or include description of items, goods or services that are prohibited under any applicable law for the time being in force, including but not

limited to the Drugs and Cosmetics Act, 1940, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 , the Indian Penal Code 1860; and

(P) Any other items considered inappropriate by the Competent Authority

SCHEDULE

ADVERTISEMENT LICENSE FEE

I. Agency registration/processing fees.-

Following fees shall be applicable for registration of Advertising Agencies/ Owner with Competent Authority:

(1) Agency Registration Fees

Sr.No.	Description	Amount (Rs)
1	*Agency Registration Fees*	Rs. 10000

(2) Processing Fees

Typology	Description	Processing Fee Per OMD
A	Outdoor Media Devices on Public Transport Services/Street Furniture	Rs. 100
B	Advertising – Outdoor Media Device on Public Transport Systems	Rs.1000
D	Outdoor Media Devices on Commercial Advertising Structures on Private Land	Rs. 1000
E	Temporary Events	Rs. 100
F	Landscape Outdoor Media Devices	Rs.100
G	Shop Signage	Rs. 100
H	Innovative Advertising	Rs. 1000
I	Cinema Advertising-In-Cinema on Screen Advertising Including Slides and	

	Advertisement Films (Moving Advertisements)	Rs. 1000 PER SCREEN
J	Inside Commercial Buildings	Rs.100

Note:

1. Applicable Tax shall be payable over and above the Fees/ charges specified above.
2. The aforesaid fees will be reviewed and notified from time to time by the Competent Authority.
3. Self Advertisers shall be exempted from payment of registration/processing fee subject to adherence to other provisions of these Rules.

II. Process of license fee determination

(1) License Fee Determination For Typology – A, C and F

(a) Typology A, C and F shall be developed preferably through Public Private Partnership (PPP) projects on the basis of advertisement master plan/zonal plan by the Municipal Authority. The selected agency shall be expected to bear the cost of making, running and managing of the device/ structure. The agency shall pay to the Competent Authority an amount based on open tender process and as per the terms of agreements and conditions of the contract. This selection process shall be typically based on highest payment to the Competent Authority, with the safeguards that highest performance standards are set out in the concession/ authorisation agreement as part of contractual obligations.

(b) In specific cases, where the land belongs to Railway/Airport Authority of India/Government/Semi Government, etc., the agency who is erecting the Outdoor Media Devices shall pay the applicable license fee as per Typology – D license fee determination.

(2) License Fee Determination For Typology – B

Public Transport Systems are essential for any city and it is the endeavour of the Competent Authority to actively promote the same. For these reasons a separate Public Transport System category is envisaged under these Rules, wherein certain concessions as well as ease of doing business have been provided to ensure that outdoor media on Public Transport Systems get appropriate occupancy leading to a more improved and sustainable Public Transport Systems.

(3) For Typology – B – Public Transport System (Rolling Stock)

Sr. No.	Description	Revenue Share With
1	Buses/Rolling Stocks Owned Or Operated By The Government Authority Or Municipal/Competent Authority	Competent Authority Exempted

(4) For Typology - B – Public Transport Vehicles (Private) (Rolling Stock)

Sr. No.	Description	License Fee (Rs)
1	Private Buses	As Decided By The Municipal Authority. (Minimum Rs. 1000 Per Month Per Bus)
2	Radio Taxi, Cars and All Kinds of Rickshaw Solely Used For Advertisement	As Decided By The Municipal Authority. (Minimum – 1000 Per Month Per Vehicle)
3	Auto Rickshaw, E-Rickshaw	As Decided By The Municipal Authority. (Minimum Rs. 250 Per Month Per Vehicle)
4	Manual Rickshaw, Hand Carts, Hawkers	As Decided By The Municipal Authority. (Exempt Maximum Permissible Size: 0.5 Sq Mt)

(5) License Fee Determination For Typology - D – For Outdoor Media Device On Private Land

The Licence Fee shall be minimum of 4% of the value of the Collector Guideline Rate in Rs/Sq Ft/Per Annum or as decided by Municipal Authority above than the minimum 4% of the value of the Collector Guideline Rate.

(6) License Fee Determination For Typology – E – For Temporary Events

Sr. No.	Description	License Fee (Rs)
1	At Venue – Maximum Size of 5 M X 3M	Rs. 5000 Per OMD/Per Instance Subject To A Maximum Period of 1 Month
2	Other Locations (Related to Event) – Maximum Size of 3M X 2 M	Rs. 2500 Per OMD/Per Instance Subject To A Maximum Period of 1 Month

(7) License Fee Determination For Typology - G – For Shop Signages

Sr. No.	Description	License Fee (Rs)
1	Maximum Height 3 Ft X The Width Of The Shop (Only For Self Advertisement)	Exempted
2	Beyond The Size And Condition Indicated In Point 1 Above	As Per The Typology D Licence Fee

(8) License Fee Determination For Typology – H – For Innovative Advertising

Sr. No.	Description	License Fee (Rs)
1	Innovative Advertising	As Decided By The Municipal Authority. (Minimum Equal To Typology D Licence Fee)

(9) License Fee Determination For Typology – I – In Cinema On Screen Advertising

Sr. No.	Description	License Fee (Rs)
1	Cinema Advertising	As Decided By The Municipal Authority. (Minimum Rs. 5000 Per Month Per Screen

(10) License Fee Determination For Typology – J – Inside Commercial Building Or Public Building

Sr. No.	Description	License Fee (Rs)
1	Inside Commercial Building	20% Of The License Fee Applicable For Typology D

FORM-I

Application Form For Registration

Registration For Display of Outdoor Advertisement

1. Name of Owner of the Property/Agency: _____
2. Registered Address: _____
3. Telephone/Mobile Number: _____
4. Business Phone Number: _____
5. Fax: _____
6. E-Mail: _____
7. Details of The Owners/Directors/Proprietor/Partners:

Sr. No.	Name	Mobile Number	E-Mail
(i)			
(ii)			

8. Type of Entity:———————————————————

9. PAN:———————————————————

10. Service Tax Number:———————————————————

11. Registration Amount:———————————————————

12. The Applicant Owner/Agency/Director has not been Debarred/Blacklisted by any Government Entity or by any Competent Authority:
YES———— No————

13. If Yes please specify:———————————————————

14. The Applicant Owner/Agency/Director has no pending dues towards Municipal Authority: (Attach No Dues Certificate From Municipal Authority)

I/We shall hereby abide the terms and conditions and guidelines of Madhya Pradesh Outdoor Advertisement Media Rules, 2016 or any other regulations framed by the Competent Authority. Also the information listed above is true and genuine and in case of adverse findings related to this, the registration shall stand cancelled.

Authorised Signatory

Form-II

Application Form For Approval of Outdoor Media Devices

(Applicable for Outdoor Media on a Private Property)

1. Name of Owner/Agency Applying:

2. Owner/Agency Registration Details: (Registration ID)

3. Contact Person:

4. Contact Details:Landline: Mobile No. Fax No.

5. Type of OMD (mark the relevant type and complete the information)

Typology	Description	Height (M)	Width (M)	Area (Sq M)	No. of OMDs
1.	Is the sign single or double sided:				
2.	Illumination applied for: YES/NO. Type of Illumination:External/ Internal/Other				
3.	Position/Location of OMD:				
4.	Street Address:				

5. Describe position on the site/Property:

6. Application Processing Fee:

7. Application Processing Fee Demand Draft/Cheque Details:

Signed by (the Applicant/Agent) Date:

Signature: Date:

Note:- This is a standard format only.

FORM-III

Application Form For Annual Renewal of Outdoor Advertisement License

No.——— Date:———

To,

_____

Subject: Annual Renewal of License fee of Outdoor Media Device for Display of Outdoor Advertisement.

Reference: Your Application No.———Dated:———

Dear Sir,

This is with reference to our OMD Number————, regarding renewal of Outdoor Media Device with the Competent Authority for display of outdoor advertisements.

We, hereby, apply for renewal of the OMD as per the Outdoor Media Rules, 2016:

The Annual renewal License fee of Outdoor Media device for Display of Outdoor Advertisement vide company ID is (In Figures) Rs.————(In Words)—

Typology	Type of OMD	Location	Size	Annual License Fee

Thanking You,

Authorise Signatory

S/d

Note:- This is a standard format only.

FORM-IV

Letter For Acceptance OR Rejection of Application For Registration

No.———— Date:————

To,

_____

Subject: Registration for Installation of Outdoor Media Device for Display of Outdoor Advertisement.

Reference: Your Application No.————Dated:————

Dear Sir,

This is with reference to your application regarding registration with the Competent Authority for installation of an Outdoor Media Device for display of outdoor advertisements.

It is informed that following decision has been taken in consideration of your application:

1. Your application for registration is approved and unique id allotted to you is————————. Please use the same for all future correspondence with the Municipal Authority and for activating your account on the website of the Municipal Authority.

2. Your application for registration is rejected on account of the following:

   a. Incomplete application.

   b. Incorrect information provided

   c. Pending dues (if any)

   d. Blacklisted status not verified

   e. Others————————

Thanking You,

Authorised Signatory

S/d

Note: In case of rejection of application you may apply fresh on satisfying the above-mentioned conditions.

Note: This is a standard format only.

FORM-V

Letter of Intent (IOI)

No.———— Date:————

To,

_____

Reference-Submission of License Fee of Outdoor Media Device for Display of Outdoor Advertisement.

Dear Sir,

This is with reference to your application regarding registration with the Competent Authority for installation of an Outdoor Media Device for display of outdoor advertisements.

It is informed that following decision has been taken in consideration of your application.

Your application for registration is approved and unique id allotted to you is—————. Please use the same for all future correspondence with the Municipal Authority and for activating your account on the website of the Municipal Authority.

The License fee of Outdoor Media device for Display of Outdoor Advertisement vide company id.————

Typology	Type of OMD	Location	Size	License Fee

Kindly submit the Licence Fee within 7 days.

Thanking You,

Authorised Signatory

Sd/-

Note:- This is a standard format only.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

राजीव शर्मा, अतिरिक्त सचिव.

NOTES OF CASES SECTION

Short Note

**(45)*

Before Mr. Justice Prakash Shrivastava

Arb. Case No. 12/2016 (Indore) decided on 13 February, 2017

AGRAWAL CONSTRUCTION COMPANY (M/S) ...Applicant

Vs.

M.P. RURAL DEVELOPMENT AUTHORITY ...Non-applicant

(Alongwith Arb. Case No. 11/2016)

Arbitration and Conciliation Act (26 of 1996), Section 11 – Appointment of Arbitrator **– Termination of contract by the respondent – Applicant seeking appointment of arbitrator for deciding the dispute – Held – As per Clause 24 and 25 of the agreement, there is a prescribed procedure for settling the dispute and appointment of arbitrator – Applicant was required to approach the competent authority i.e. Chief Executive Officer before filing the present application – Applicant has directly approached this Court without exhausting the procedure laid down in the agreement – Mandatory condition for approaching this Court as provided u/S 11 of the Act has not been complied with – Arbitration cases dismissed.**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 – मध्यस्थ की नियुक्ति – प्रत्यर्थी द्वारा संविदा का पर्यवसान – आवेदक ने विवाद का विनिश्चय किये जाने हेतु मध्यस्थ की नियुक्ति चाही – अभिनिर्धारित – करार के खंड 24 एवं 25 के अनुसार, विवाद के निपटारे तथा मध्यस्थ की नियुक्ति करने हेतु एक विहित प्रक्रिया है – आवेदक का वर्तमान आवेदन प्रस्तुत करने से पूर्व सक्षम प्राधिकारी अर्थात् मुख्य कार्यपालन अधिकारी के समक्ष जाना अपेक्षित था – आवेदक करार में अधिकथित/ दी गई प्रक्रिया को निःशेष किये बिना सीधे न्यायालय के समक्ष आया है – न्यायालय के समक्ष जाने की आज्ञापक शर्त जैसा कि इस अधिनियम की धारा 11 के अंतर्गत उपबंधित है का अनुपालन नहीं किया गया है – माध्यस्थम् प्रकरण खारिज।

Cases referred:

2006 (10) SCC 763, 2007 (5) SCC 344, (2008) 10 SCC 240, (2013) 4 SCC 35, (2015) 3 SCC 800, (2012) 3 SCC 495.

Shekhar Sharma with *Yatish Laad*, for the applicant.
Anita Sharma, for the non-applicant.

Short Note

****(46)***

Before Mr. Justice C.V. Sirpurkar

M.Cr.C. No. 21792/2015 (Jabalpur) decided on 5 April, 2016

ANAND TIWARI ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Prevention of Insults to National Honour Act (69 of 1971), Section 2, Explanation 4(1) & 3 **– Unfurling/Displaying National Flag upside down – Allegation against Collector – Held – Collector is the highest authority in District and he can't be expected to check beforehand the position of the flag – It was the job of one of his staff for which Collector cannot be held vicariously liable – No prudent person would believe that Collector would unfurl the flag upside down to jeopardize his career and reputation – Further held – When the National Anthem was going on, on being pointed out about the said mistake, Collector rightly continued with the National Anthem and did not tried to stop the National Anthem in the midway – If that was done by the Collector, he would have committed an offence u/S 3 of the Act – No case is made out – Out of such unfortunate lapse, petitioner ventured to such litigation to gain publicity or petitioner may have personal axe to grind against the Collector – To discourage filing of such petitions, cost of Rs. 10,000/- imposed on petitioner – Petition dismissed.**

राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धारा 2, स्पष्टीकरण 4(1) व 3 – उल्टा राष्ट्रध्वज फहराया/प्रदर्शित किया जाना – कलेक्टर के विरूद्ध अभिकथन – अभिनिर्धारित – कलेक्टर जिले का सर्वोच्च प्राधिकारी होता है और उससे यह अपेक्षा नही की जा सकती कि वह ध्वज की स्थिति की पहले से जांच करें – यह काम उसके स्टाफ में से किसी एक का था जिसके लिए कलेक्टर को प्रतिनिधिक रूप से दायी नहीं ठहराया जा सकता – कोई प्रज्ञावान व्यक्ति विश्वास नहीं करेगा कि कलेक्टर अपने करियर और प्रतिष्ठा को खतरे में डालकर उल्टा ध्वज फहरायेगा – आगे अभिनिर्धारित – जब राष्ट्रगान चल रहा था, कलेक्टर ने, उसे उक्त गलती की ओर ध्यान दिलाये जाने पर, उचित रूप से राष्ट्रगान जारी रखा और बीच

में राष्ट्रगान रोकने का प्रयास नहीं किया – यदि कलेक्टर द्वारा ऐसा किया गया होता तो उससे अधिनियम की धारा 3 के अंतर्गत अपराध कारित होता – कोई प्रकरण नहीं बनता है – ऐसी दुर्भाग्यपूर्ण त्रुटि से याची ने लोकप्रियता प्राप्त करने हेतु उक्त मुकदमा करने का कार्य किया या हो सकता है उसे कलेक्टर के विरूद्ध कोई व्यक्तिगत बदला लेना हो – ऐसी याचिकाओं के प्रस्तुतीकरण को हतोत्साहित करने हेतु, याची पर रू. 10,000/– का व्यय अधिरोपित किया गया – याचिका खारिज।

Cases referred:

2010 (1) MPLJ (Cr.) 63, 2012 (2) MPLJ (Cr.) 187, 2003 (3) MPLJ 326, 2009 (2) MPLJ (Cr.) 564, (2005) 5 SCC 330.

Ashok Kumar Jain, for the applicant.
Vijay Soni, P.L. for the non-applicant State.

Short Note

****(47)***

Before Mr. Justice Rohit Arya

W.P. No. 11580/2016 (Jabalpur) decided on 20 July, 2016

BHUPENDRA SINGH RAWAT & ors. ...Petitioners

Vs.

STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 12043/2016)

Service Law – **Relaxation in the upper age limit for the purposes of recruitment – Police Executive (Non-Gazetted) Service Recruitment Rules, M.P. 1997, Rule 8 – Exercise of powers u/A 226 and 227 of the Constitution of India – The Court cannot give direction to the State to relax the conditions stipulated in the Rules based on executive instructions in the matter of recruitment to posts under the Rules – Writ Petitions dismissed.**

सेवा विधि – भर्ती के प्रयोजन हेतु उच्चतर आयु सीमा में छूट – म.प्र. पुलिस कार्यपालिक (अराजपत्रित) सेवा भर्ती नियम, 1997, नियम 8 – भारतीय संविधान के अनुच्छेद 226 एवं 227 के अंतर्गत शक्तियों का प्रयोग – न्यायालय राज्य को नियमों के अंतर्गत पदों की भर्ती के मामले में कार्यकारी अनुदेशों के आधार पर नियमों में निर्धारित शर्तों को शिथिल करने का निदेश नहीं दे सकता

– रिट याचिकाएँ खारिज।

Cases referred:

AIR 1972 SC 1767, AIR 1990 SC 334, AIR 2002 SC 2112.

Mahendra Pateriya, for the petitioner in W.P. No. 11580/2016.
Akash Choudhary, for the petitioner in W.P. No. 12043/2016.
Samdarshi Tiwari, Dy. A.G. for the respondents/State.

Short Note

****(48)***

Before Mr. Justice J.P. Gupta

F.A. No. 90/2004 (Jabalpur) decided on 20 September, 2016

EXECUTIVE ENGINEER GRAH NIRAMAN MANDAL ...Appellant
Vs.
CHAIN SINGH & anr. ...Respondents

Land Acquisition Act (1 of 1894), Section 18 & 54 – Reference to Court – Determination and enhancement of compensation – **Maintainability of reference application – Appeal against the order of the Reference Court/District Court whereby the amount of compensation was enhanced – Held – learned court below on the basis of the proved sale deed calculated total price of land in the year 1994 which was acquired on 05.05.2000 – Lower Court, considering the fact of escalation in the price of land per year, considered the rate of escalation by 10 to 15 percent per year with cumulative effect, thereby for more than six years, as in the present case, considered 100% escalation in the price of the land – Approach of the Court below is not arbitrary – Further held – Filing of application u/S 18 of the Act for reference shows that compensation was received under protest – Person cannot be deprived to get appropriate compensation of his property merely on the hyper technical ground that person has not expressed his protest in writing – Reference application was maintainable – Appeal dismissed.**

भूमि अर्जन अधिनियम (1894 का 1), धारा 18 व 54 – न्यायालय को निर्देश – प्रतिकर का निर्धारण एवं वृद्धि – निर्देश आवेदन की पोषणीयता – निर्देश

न्यायालय/जिला न्यायालय के आदेश जिसके द्वारा प्रतिकर की राशि बढ़ायी गई थी, के विरूद्ध अपील – अभिनिर्धारित – विद्वान निचले न्यायालय ने प्रमाणित विक्रय विलेख के आधार पर वर्ष 1994 में भूमि की कुल कीमत की गणना की जिसे 05.05.2000 को अर्जित किया गया था – निचले न्यायालय ने भूमि की कीमत में प्रतिवर्ष बढ़ोतरी के तथ्य को विचार में लेते हुए, संचयी प्रभाव से 10 से 15 प्रतिशत बढ़ोतरी को विचार में लिया; जिससे छः वर्ष से अधिक के लिए, जैसा कि वर्तमान प्रकरण में है, भूमि की कीमत में 100% बढ़ोतरी को विचार में लिया – निचले न्यायालय का दृष्टिकोण मनमाना नहीं – आगे अभिनिर्धारित – निर्देश हेतु अधिनियम की धारा 18 के अंतर्गत आवेदन प्रस्तुत किया जाना दर्शाता है कि प्रतिकर को विरोध के साथ प्राप्त किया गया था – व्यक्ति को मात्र अति तकनीकी आधार पर कि उस व्यक्ति ने लिखित में विरोध अभिव्यक्त नहीं किया है, उसे अपनी संपत्ति का समुचित प्रतिकर प्राप्त करने से वंचित नहीं किया जा सकता – निर्देश आवेदन पोषणीय था – अपील खारिज।

Cases referred:

AIR 2014 SC 793, AIR 1992 SC 974=1992 (2) SCC 592, (1994) 4 SCC 67, 2004 (3) MPLJ 200, 2012 (4) MPLJ 61, (2012) 12 SCC 133.

R.K. Samaiya, for the appellant.
Piyush Bhatnagar, for the respondent No.1.

Short Note

****(49)***

Before Mr. Justice Anurag Shrivastava

F.A. No. 181/2015 (Jabalpur) decided on 11 November, 2016

GULAB CHAND ...Appellant
Vs.
SARDAR PATEL & anr. ...Respondents

***Limitation Act (36 of 1963), Section 5 – Condonation of Delay – Sufficient Cause* – Delay of more than 10 years – Appellant submitted that counsel did not inform him about the case from 1996 till 2009 – Held – Appellant was expected to seek information about the progress of his case from his counsel time to time as the case was fixed for evidence – It is also not possible that counsel of appellant did not informed him despite seven adjournments taken by the counsel – For more than 10 years, appellant remained silent which shows his lack of**

interest in the case, his negligence and lack of *bonafide* – Appellant himself neglected to participate in the suit and without any reasonable cause avoided to enquire about his case which shows that he himself was not diligent in prosecution of his case – Delay not properly explained – No sufficient cause is made out for condonation of delay – Application for condonation of delay and Appeal dismissed.

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब की माफी – पर्याप्त कारण – 10 वर्षों से अधिक का विलंब – अपीलार्थी ने यह प्रस्तुत किया कि अधिवक्ता ने उसे 1996 से लेकर 2009 तक प्रकरण के बारे में कोई जानकारी नहीं दी – अभिनिर्धारित – अपीलार्थी को अपने अधिवक्ता से समय–समय पर अपने प्रकरण की प्रगति के बारे में जानकारी चाहने की प्रत्याशा थी क्योंकि प्रकरण साक्ष्य हेतु नियत किया गया था – यह भी संभव नहीं है कि अपीलार्थी के अधिवक्ता ने उसके द्वारा लिये गये सात स्थगन के बावजूद उसे सूचित नहीं किया – दस वर्षों से अधिक समय तक अपीलार्थी मौन रहा जो कि उसकी प्रकरण में रूचि का अभाव, उपेक्षा तथा सद्भाविकता का अभाव दर्शाता है – अपीलार्थी ने स्वयं से वाद में सहभाग लेने में उपेक्षा की तथा बिना किसी युक्तियुक्त कारण के अपने प्रकरण के बारे में पूछताछ करने से बचा, जो यह दर्शाता है कि वह स्वयं अपने प्रकरण के अभियोजन में तत्पर नहीं था – विलंब उचित रूप से स्पष्ट नहीं किया गया – विलंब की माफी हेतु कोई पर्याप्त कारण नहीं बनता – विलंब की माफी हेतु आवेदन तथा अपील खारिज।

Cases referred:

1998 (1) MPWN short note-31, 2000 (1) MPHT 384, (2015) 3 SCC 569, AIR 1998 SC 3222, 2006 (3) JLJ 292, (2009) 11 SCC 183, 2013 (1) MPLJ 56, 1979 (1) MPWN short note 306, AIR 1960 SC 361.

Hemant Kumar Namdeo, for the appellant.
Sudipta Choubey, for the respondent No.1.
Pratibha Mishra, P.L. for the respondent No. 2/State.

Short Note

****(50)***

Before Mr. Justice S.A. Dharmadhikari

W.P. No. 7893/2015 (Gwalior) decided on 10 February, 2017

KEDAR SINGH YADAV ...Petitioner

Vs.

STATE OF M.P. & ors. ...Respondents

Kashtha Chiran (Viniyaman) Adhiniyam, M.P. (13 of 1984), Section 5 & 6 **– Revocation of License of saw mill on the ground of possessing illegal stock of wood – Opportunity of hearing – Held – Statement of all prosecution witnesses and other material/documents on the basis of which opinion has been formed, were neither supplied to the petitioner nor an opportunity of cross examination was given – Licensing authority also failed to exercise the powers u/S 6 of the Act on a reference to impose cost of Rs. 10,000 – No enquiry was conducted by the Licensing Authority – Order is *per-se-illegal* – Matter remitted back to Licensing Authority to proceed afresh in accordance with law – Petition disposed of.**

काष्ठ चिरान (विनियमन) अधिनियम, म.प्र. (1984 का 13), धारा 5 व 6 – काष्ठ का अवैध भंडार कब्जे में होने के आधार पर आरामशीन की अनुज्ञप्ति का प्रतिसंहरण – सुनवाई का अधिकार – अभिनिर्धारित – सभी अभियोजन साक्षियों के कथन एवं अन्य सामग्री/दस्तावेज, जिनके आधार पर राय बनायी गई है, उन्हें न तो याची को प्रदाय किया गया था न ही प्रतिपरीक्षण का अवसर दिया गया था – अनुज्ञप्ति प्राधिकारी, रू. 10,000 व्यय अधिरोपित करने के निर्देश पर, अधिनियम की धारा 6 के अंतर्गत शक्तियों का प्रयोग करने में भी विफल रहा – अनुज्ञप्ति प्राधिकारी द्वारा कोई जांच संचालित नहीं की गई थी – आदेश स्वतः अवैध है – अनुज्ञप्ति प्राधिकारी को विधि अनुसार नये सिरे से कार्यवाही करने के लिए मामला प्रतिप्रेषित किया गया – याचिका का निपटारा किया गया।

Case referred:

2003 (1) MPLJ 471.

H.D. Gupta with *M.L. Sharma*, for the petitioner.
Nidhi Patankar, G.A. for the respondents/State.

Short Note
****(51)***
Before Ms. Justice Vandana Kasrekar
W.P. No. 8778/2016 (Jabalpur) decided on 3 November, 2016

MAHANT HANUMAN DAS GURU SWAMI PURSHOTTAM DAS JI ...Petitioner
Vs.
SAPNA CHOUDHARY & ors. ...Respondents

Civil Procedure Code (5 of 1908), Section 10 – Stay of Proceeding **– Held – Provisions of Section 10 CPC can only be attracted where parties to the suit are same, the entire subject matter of both the suits are directly and substantially the same and identical – In the present case, parties in both the suits are different and reliefs claimed by the plaintiff in both the suits are not identical and therefore judgment passed in the previous suit will not operate as *res judicata* in the subsequent suit – Trial Court rightly rejected the application – Petition dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – कार्यवाही का रोका जाना – अभिनिर्धारित – सिविल प्रक्रिया संहिता की धारा 10 के उपबंध केवल तब आकर्षित होते हैं जहाँ वाद के पक्षकार समान हों, दोनों वादों की संपूर्ण विषय वस्तु प्रत्यक्षतः एवं सारतः समान एवं समरूप हो – वर्तमान प्रकरण में, दोनों वादों में पक्षकार भिन्न हैं तथा दोनों वादों में वादी द्वारा दावा किया गया अनुतोष समरूप नहीं है एवं इसलिए पूर्व वाद मे पारित किया गया निर्णय पश्चात्वर्ती वाद में पूर्वन्याय में प्रवर्तित नहीं होगा – विचारण न्यायालय ने उचित रूप से आवेदन नामंजूर किया – याचिका खारिज।

Cases referred:

(2005) 2 SCC 256, 2014 (2) MPLJ 606, (2013) 4 SCC 333.

Mrigendra Singh with *Sachin Yadav*, for the petitioner.
Sanjay Kumar Agrawal, for the respondent Nos. 1 & 3.

Short Note

****(52)***

Before Mr. Justice Sheel Nagu

W.P. No. 1550/2009 (Gwalior) decided on 28 July, 2016

MANOHARLAL ...Petitioner

Vs.

STATE OF M.P. & ors. ...Respondents

Service Law – Wrongful Denial of Promotion – Arrears of salary – **Entitlement of difference of salary – Held – Once this court in earlier round of litigation held that promotion of petitioner was wrongly denied and such denial is not based on any reason attributed to the petitioner, and at the same time there is no restriction in law for grant of arrears of salary**

to him, he is entitled to relief of difference of salary – Further held – State should have justified its claim being a welfare State – Petitioner is also entitled to interest on the arrears of salary @ 9% per annum from the date the arrears became due till realization – Petition allowed.

सेवा विधि – पदोन्नति की दोषपूर्ण अस्वीकृति – बकाया वेतन – वेतन में अंतर की हकदारी – अभिनिर्धारित – एक बार इस न्यायालय ने मुकदमेबाजी के पूर्वतर दौर में यह अभिनिर्धारित किया कि याची की पदोन्नति गलत रूप से अस्वीकार की गई थी तथा ऐसा अस्वीकार किया जाना किसी ऐसे कारण पर आधारित नहीं है जिसके लिए याची जिम्मेदार हो तथा उसी समय उसको वेतन का बकाया प्रदान करने हेतु विधि में कोई निर्बन्धन नहीं है, वह वेतन में अंतर का अनुतोष पाने का हकदार है – आगे अभिनिर्धारित – राज्य को कल्याणकारी राज्य होने के अपने दावे को न्यायोचित सिद्ध करना चाहिए – याची, बकाया देय होने की तिथि से वसूली होने तक 9 प्रतिशत प्रति वर्ष की दर से बकाया वेतन पर ब्याज प्राप्त करने का भी हकदार है – याचिका मंजूर।

Case referred:

W.P. No. 538/2010 decided on 06.07.2015.

Prashant Sharma, for the petitioner.
Kamal Jain, G.A. for the respondents/State.

Short Note

****(53)***

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 6727/2011 (Gwalior) decided on 22 December, 2016

MANOJ ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

Penal Code (45 of 1860), Section 107 & 306 – Abetment of suicide – **If deceased had given a love letter to a girl and thereafter he was scolded or even beaten by the shopkeepers and making a complaint to his family members about his conduct, cannot be said to be an act which may amount to instigating the deceased to commit suicide – Evidence on record shows that accused only made a telephonic call to the family members of the deceased informing them about the**

conduct of the deceased – It cannot be presumed that the applicant/ accused in any manner instigated or abetted or provoked the deceased to commit suicide – *Prima facie* no case is made out against the accused/ applicant u/S 306 IPC – Proceedings stand quashed – Application allowed.

दण्ड संहिता (1860 का 45), धारा 107 व 306 – आत्महत्या का दुष्प्रेरण – यदि मृतक ने युवती को एक प्रेमपत्र दिया था और तत्पश्चात् उसे दुकानदारों द्वारा डांटा या पीटा भी गया तथा उसके परिवार के सदस्यों से उसके आचरण के बारे में शिकायत की जाना ऐसा कृत्य नहीं कहा जा सकता जो मृतक को आत्महत्या करने के लिए उकसाने की कोटि में आता हो – अभिलेख का साक्ष्य दर्शाता है कि अभियुक्त ने मृतक के आचरण के बारे में मृतक के परिवार के सदस्यों को केवल दूरभाष पर जानकारी दी – यह उपधारणा नहीं की जा सकती कि आवेदक/अभियुक्त ने किसी भी ढंग से मृतक को आत्महत्या करने के लिए उकसाया या दुष्प्रेरित किया या प्रकोपित किया – प्रथम दृष्ट्या, अभियुक्त/आवेदक के विरूद्ध भा.दं.सं. की धारा 306 के अंतर्गत कोई प्रकरण नहीं बनता – कार्यवाहियां अभिखंडित की गई – आवेदन मंजूर।

Cases referred:

(2009) 16 SCC 605, (2012) 9 SCC 734, (2002) 5 SCC 371, (2010) 1 SCC 750, 1994 (1) SCC 73, AIR 2011 SC 1238, (2007) 10 SCC 797, (2010) 1 SCC 707.

Aditya Singh, for the applicant.
R.D. Agrawal, P.L. for the non-applicant No. 1/State.

Short Note

****(54)***

Before Smt. Justice Anjuli Palo

M.Cr.C. No. 20958/2015 (Jabalpur) decided on 08 February, 2017

MUIN SHEIK & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Inherent Powers – Facts* – False implication by non-applicant No. 2 after filing of complaint & petition u/S 12 of Domestic Violence Act, 2005 by the applicant – Question of facts – Maintainability u/S 482 –**

Held – All contentions raised by the applicants are question of facts which has to be decided after recording of evidence – It is settled law that truthfulness of documents can not be evaluated at this stage in proceedings u/S 482 of Cr.P.C. – Inherent powers u/s. 482 of Cr.P.C. should be exercised with great care and caution.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्तियाँ– तथ्य – आवेदक द्वारा घरेलू हिंसा अधिनियम, 2005 की धारा 12 के अंतर्गत परिवाद एवं याचिका प्रस्तुत करने के पश्चात्, अनावेदक क्र. 2 द्वारा मिथ्या आलिप्त किया जाना – तथ्य का प्रश्न – धारा 482 के अंतर्गत पोषणीयता – अभिनिर्धारित – आवेदकगण द्वारा उठाये गये सभी तर्क तथ्य के प्रश्न हैं जिन्हें कि साक्ष्य अभिलिखित किये जाने के पश्चात् विनिश्चित किया जाना चाहिए – यह सुस्थापित विधि है कि दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत कार्यवाहियों में इस प्रक्रम पर दस्तावेजों की सत्यता का मूल्यांकन नहीं किया जा सकता – धारा 482 के अंतर्गत अंतर्निहित शक्तियों का प्रयोग अधिक सतर्कता एवं सावधानी से किया जाना चाहिए।

Cases referred:

(2016) 10 SCC 458, (2016) 3 SCC 309.

R.S. Yadav, for the applicants.
Ramesh Kushwah, P.L. for the non-applicant/State.

Short Note

****(55)***

Before Mr. Justice S.K. Awasthi

Cr.R. No. 1034/2014 (Gwalior) decided on 4 November, 2016

NARAYAN SINGH ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Sections 279, 337 & 338 – Conviction **– Term 'Negligent' – Applicant was the registered owner of the offending vehicle – Trial Court convicted the applicant primarily on the testimony of Kamal, who identified the applicant as the driver of the offending vehicle – Perusal of examination-in-chief of Kamal (PW-2) does not reveal extent of speed at which the offending vehicle was being plied – Merely using the term 'negligent' in the statement cannot**

be made basis of conviction – None of the examined witnesses has stated the exact or approximate speed of the vehicle, even prosecution has not made any attempt to prove the exact speed of the vehicle from any of the witnesses nor any attempt was made to collect scientific and technical evidence – Merely, on the basis of witnesses stating high speed of vehicle and negligent driving, applicant cannot be convicted – Other two injured witnesses have not even identified the present applicant as the driver of the vehicle, one of them was the complainant who got the FIR registered – Judgment passed by the Sessions Court as well as by the Trial Court are set aside – Appellant acquitted.

दण्ड संहिता (1860 का 45), धाराएँ 279, 337 व 338 – दोषसिद्धि – शब्द 'उपेक्षापूर्ण' – आवेदक, आक्रामक वाहन का रजिस्ट्रीकृत स्वामी था – विचारण न्यायालय ने आवेदक को मुख्य रूप से कमल जिसने आवेदक की आक्रामक वाहन के चालक के रूप में पहचान की, के परिसाक्ष्य पर दोषसिद्ध किया – कमल (अ.सा.–2) के मुख्य परीक्षण का अवलोकन गति की सीमा को प्रकट नहीं करता जिस पर आक्रामक वाहन चलाया जा रहा था – कथन में मात्र 'उपेक्षापूर्वक' शब्द का उपयोग किये जाने को दोषसिद्धि का आधार नहीं बनाया जा सकता – परीक्षित साक्षीगण में से किसी ने भी वाहन की निश्चित या अनुमानित गति के बारे में कथन नहीं किया है, यहाँ तक कि अभियोजन ने भी किसी भी साक्षीगण से वाहन की निश्चित गति साबित करने का कोई प्रयास नहीं किया है और न ही वैज्ञानिक एवं तकनीकी साक्ष्य एकत्रित करने हेतु कोई प्रयास किया गया था – मात्र वाहन की उच्च गति तथा उपेक्षापूर्वक वाहन चलाने का कथन करने वाले साक्षीगण के आधार पर आवेदक को दोषसिद्ध नहीं किया जा सकता – अन्य दो आहत साक्षीगण ने वर्तमान आवेदक की वाहन के चालक के रूप में पहचान भी नहीं की है, जिनमें से एक परिवादी था जिसने प्रथम सूचना प्रतिवेदन दर्ज कराई थी – सत्र न्यायालय के साथ–साथ विचारण न्यायालय द्वारा पारित निर्णय अपास्त – अपीलार्थी दोषमुक्त।

Cases referred:

(2014) 6 SCC 173, I.L.R. (2011) MP 2904.

D.S. Kushwaha, for the applicant.
Sudha Shrivastava, P.L. for the non-applicant/State.

Short Note

****(56)***

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 4309/2016 (Gwalior) decided on 8 December, 2016

POORAN SINGH JATAV ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 195(1)(a)(i) & 216, Penal Code (45 of 1860), Sections 186, 353 & 506 part II and Electricity Act (36 of 2003), Section 135 – Alteration of charges – Electricity theft case – **Initially charge u/S 135 of Electricity Act was framed against the accused but later, charges u/S 186, 353 and 506 part II of IPC were added by the trial Court – Held – There is a specific bar created u/S 195(1)(a)(i) CrPC according to which the trial Court cannot take cognizance of the offence u/S 186 IPC without there being any complaint by the concerned public servant – Further held – Since the ingredients of the offence u/S 186 and 353 IPC are different, court can take cognizance of offence u/S 353 IPC – Charge u/S 186 IPC set aside – Trial Court to proceed with charges u/S 353 and 506 part II IPC and u/S 135 Electricity Act, 2003 – Application partly allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(1)(ए)(आई) व 216, दण्ड संहिता (1860 का 45), धाराएँ186, 353 व 506 भाग–II एवं विद्युत अधिनियम (2003 का 36), धारा 135 – आरोपों को परिवर्तित किया जाना – विद्युत चोरी प्रकरण – आरंभ में अभियुक्त के विरूद्ध विद्युत अधिनियम की धारा 135 के अंतर्गत आरोप विरचित किया गया परंतु बाद में, विचारण न्यायालय द्वारा भा.द.सं. की धाराएँ 186, 353 व 506 भाग–II के अंतर्गत आरोप जोड़े गये – अभिनिर्धारित – दं.प्र.सं. की धारा 195(1)(ए)(आई) के अंतर्गत विनिर्दिष्ट वर्जन सूजित है जिसके अनुसार विचारण न्यायालय, संबंधित लोक सेवक की किसी शिकायत के बिना भा.दं.सं. की धारा 186 के अंतर्गत अपराध का संज्ञान नहीं ले सकता – आगे अभिनिर्धारित – चूंकि भा.दं.सं. की धारा 186 एवं 353 के अंतर्गत अपराध के घटक भिन्न है, न्यायालय भा.दं.सं. की धारा 353 के अंतर्गत अपराध का संज्ञान ले सकता है – आरोप अंतर्गत धारा 186 भा.दं.सं. अपास्त – विचारण न्यायालय भा.दं.सं. की धारा 353 व 506 भाग–II एवं विद्युत अधिनियम 2003 की धारा 135 के अंतर्गत आरोपों पर कार्यवाही करें – आवेदन अंशतः मंजूर।

Cases referred:

1987 CrLJ 1950, AIR 1966 SC 1775.

R.S. Bansal, for the applicant.
Sudha Shrivastava, P.L. for the non-applicant/State.

Short Note

****(57)***

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 3593/2016 (Gwalior) decided on 4 January, 2017

RAHUL MATHUR & ors. ...Applicants

Vs.

STATE OF M.P. & ors. ...Non-applicants

Penal Code (45 of 1860), Section 420/34 – Essentials – **Distinction between breach of contract and offence of cheating is very fine – It depends on the intention of the accused at the very inception which may be judged by his subsequent conduct – Mere failure to keep the promise at the subsequent stage may not be an offence u/S 420 IPC – Accused persons obtaining Rs. 50 lacs from complainant on the pretext of executing a sale deed in his favour and subsequently eloping from their residence and shutting off their mobiles clearly shows that they want to hide their whereabouts from the complainant – It cannot be said that it is a case of purely civil nature – FIR *prima facie* discloses the commission of cognizance offence and cannot be quashed at this stage where investigation is still in progress – Application dismissed.**

दण्ड संहिता (1860 का 45), धारा 420/34 – आवश्यक घटक – संविदा का भंग और छल के अपराध के बीच में विभेद बहुत सूक्ष्म है – यह अभियुक्त के एकदम शुरूआत के आशय पर निर्भर होता है जिसे उसके पश्चात्वर्ती आचरण द्वारा परखा जा सकता है – पश्चात्वर्ती प्रक्रम पर मात्र वचन पर कायम रहने में विफलता, भा. दं.सं. की धारा 420 के अंतर्गत अपराध नहीं हो सकता – अभियुक्तों द्वारा शिकायतकर्ता से उसके पक्ष में विक्रय विलेख निष्पादित करने के बहाने रूपये 50 लाख प्राप्त करना और तत्पश्चात् अपने निवास स्थान से भाग जाना एवं अपने मोबाईल बंद करना स्पष्ट रूप से दर्शाता है कि वे शिकायतकर्ता से अपने ठिकाने को छुपाना चाहते हैं – यह नहीं कहा जा सकता कि यह शुद्ध रूप से सिविल स्वरूप

का प्रकरण है – प्रथम दृष्ट्या, प्रथम सूचना रिपोर्ट संज्ञेय अपराध कारित होना प्रकट करती है और इस प्रक्रम पर जहां अन्वेषण अभी प्रगति पर है, इसे अभिखंडित नहीं किया जा सकता – आवेदन खारिज।

Cases referred:

AIR 2003 SC 974, AIR 2006 SC 2780, AIR 2008 SC 251, AIR 2009 SC 3191, AIR 2013 SC 1952, (2007) 14 SCC 776, (2009) 3 SCC 375, (2015) 1 SCC 513, (2009) 4 SCC 439, (2001) 3 SCC 513, (2014) 15 SCC 221, (2012) 4 SCC 547.

R.K. Sharma, for the applicants.
Girdhari Singh Chauhan, P.P. for the non-applicant No. 1/State.

Short Note
****(58) (DB)***
Before Mr. Justice S.C. Sharma & Mr. Justice Ved Prakash Sharma
Cr.R. No. 920/2016 (Indore) decided on 21 October, 2016

RAJKAMAL SHARMA ...Applicant
Vs.
STATE OF M.P. THROUGH SPECIAL POLICE ESTABLISHMENT (LOKAYUKT) ...Non-applicant

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) r/w Section 13(2) and Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 173(8) & 465(2) – **Revision against dismissal of application for issuance of direction to conduct further investigation with regard to his own income from various sources as well as income of family members – Held – Prayer made by petitioner clearly indicates that in guise of further investigation he wants to establish his defence – A public servant accused of being in possession of disproportionate assets is required to establish his defence before trial Court and that the investigating agency is not under an obligation to look into the same – Application devoid of merit dismissed.**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) सहपठित धारा 13(2) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 173(8) व 465(2) – विभिन्न स्त्रोतों से अपनी आय के साथ ही परिवार के सदस्यों की आय

के संबंध में अतिरिक्त अन्वेषण का संचालन करने के लिए निदेश जारी करने हेतु आवेदन की खारिजी के विरूद्ध पुनरीक्षण – अभिनिर्धारित – याची द्वारा की गई प्रार्थना स्पष्ट रूप से यह दर्शाती है कि अतिरिक्त अन्वेषण की आड़ में वह अपना बचाव स्थापित करना चाहता है – एक लोकसेवक जिस पर कि अननुपातिक आस्तियों को कब्जे में रखने का अभियोग है, उसे विचारण न्यायालय के समक्ष अपना बचाव स्थापित करना अपेक्षित है तथा अन्वेषण एजेन्सी उक्त की जांच–पड़ताल करने हेतु बाध्यताधीन नहीं है – आवेदन गुणदोष रहित होने से खारिज।

The order of the Court was delivered by : VED PRAKASH SHARMA, J.

Cases referred:

(2016) 3 SCC 135, (2013) 5 SCC 762, (2016) 4 SCC 160, 2004 (1) SCC 691, AIR 1996 SC 722.

Piyush Mathur with *M.S. Dwivedi*, for the applicant.
Anand Soni, for the non-applicant-Lokayukt.

Short Note

****(59)***

Before Mr. Justice H.P. Singh

M.Cr.C. No. 18181/2016 (Jabalpur) decided on 24 October, 2016

RAJ KUMAR CHOUDHARY ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Section 363 & 366 – Kidnapping/ Abduction – Quashment of F.I.R. **– It was alleged that applicant has abducted the prosecutrix from lawful custody of her parents – Prosecutrix more than 18 years of age – Statement of prosecutrix that she had voluntarily accompanied the applicant as she was in love with the applicant and got married – Living as husband & wife for last six months – Held – It is amply clear that prosecutrix had voluntarily accompanied the applicant and she was major at the time of incident and she had married the applicant, so at this stage no useful purpose will be served if prosecution is permitted to proceed further and is allowed to file the charge sheet – F.I.R. registered against the applicant quashed – Application u/S 482 of Cr.P.C. allowed.**

दण्ड संहिता (1860 का 45), धारा 363 व 366 – व्यपहरण/अपहरण – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – यह अभिकथन किया गया था कि आवेदक ने अभियोक्त्री का उसके माता–पिता की विधिपूर्ण अभिरक्षा से व्यपहरण किया – अभियोक्त्री की आयु 18 वर्ष से अधिक – अभियोक्त्री का कथन कि वह स्वेच्छापूर्वक आवेदक के साथ गई थी क्योंकि वह आवेदक से प्रेम करती थी और उन्होनें विवाह किया – पिछले छः माह से पति–पत्नी के रूप में रह रहे हैं – अभिनिर्धारित – यह पर्याप्त रूप से स्पष्ट है कि अभियोक्त्री स्वेच्छापूर्वक आवेदक के साथ गई और घटना के समय वह वयस्क थी तथा उसने आवेदक से विवाह किया था, अतः इस प्रक्रम पर कोई उपयोगी प्रयोजन पूरा नहीं होगा यदि अभियोजन को आगे कार्यवाही करने की अनुमति दी जाती है और आरोप पत्र प्रस्तुत करने के लिए मंजूरी दी जाती है – आवेदक के विरूद्ध पंजीबद्ध प्रथम सूचना प्रतिवेदन अभिखंडित – दं.प्र.सं. की धारा 482 के अंतर्गत आवेदन मंजूर।

Cases referred:

ILR (2014) MP 1436, (1992) Suppl. SCC 715, 2006 Cr.L.J. 4287.

Rajesh Tiwari, for the applicant.
R.S. Shukla, P.L. for the non-applicant/State.
Vijay Shukla, for the complainant.

Short Note

****(60)(DB)***

Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma

W.P. No. 394/2015 (Indore) decided on 6 April, 2016

STATE BANK OF INDIA ...Petitioner
Vs.
SHRI RAJEEV ARYA & ors. ...Respondents

Security Interest (Enforcement) Rules, 2002, Rules 3, 8(6) (e), 9 & 9(4) and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002) **– Earnest money was deposited by successful bidders who could not deposit 25% of bid amount, therefore, the earnest money was forfeited – DRAT in appeal directed to refund the earnest money – Nothing on record that Bank at any point of time had waived off its right against the forfeited amount – Order passed by DRAT not in accordance of legal provision of law –**

Liable to be set aside.

प्रतिभूति हित (प्रवर्तन) नियम, 2002, नियम 3, 8(6)(ई), 9 व 9(4) एवं वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54) – सफल बोली लगाने वालों द्वारा अग्रिम राशि जमा की गई थी, जो बोली राशि का 25 प्रतिशत जमा नहीं कर सके, इसलिए अग्रिम राशि समपहृत की गई थी – अपील में डी.आर.ए.टी. ने अग्रिम राशि वापस करने हेतु निदेशित किया – अभिलेख में ऐसा कुछ नहीं है कि बैंक ने किसी समय समपहृत राशि के विरूद्ध अपने अधिकार का त्यजन किया हो – डी.आर.ए.टी. द्वारा पारित आदेश विधिक उपबंधों के अनुसार नहीं – अपास्त किये जाने योग्य है।

The order of the Court was delivered by : ALOK VERMA, J.

Cases referred:

2013 (10) SCC 83, Civil Appeal Nos. 4159 & 6418 of 2003 decided on 06.05.2008 (SC), (2010) 1 SCC 655.

A.K. Sethi with *R.C. Sinhal*, for the petitioner.
Manish Nair, for the respondent No. 1.
Atul Sreedharan, for the respondent No. 2.

Short Note

****(61)***

Before Mr. Justice J.P. Gupta

F.A. No. 207/2002 (Jabalpur) decided on 20 September, 2016

STATE OF M.P. ...Appellant
Vs.
GHANSHYAM PATHAK & anr. ...Respondents

***Land Acquisition Act (1 of 1894), Section 23(1-A) – Interest on Market Value of the acquired land – Determination* – Notification published in official gazette dated 21.09.1990 – Date of taking possession of land is 01.06.1989 – Interest is payable only on market value of acquired land from date of taking possession of land or from the date of the publication of the notification under sub-Section (1), whichever is earlier – Both the respondents/claimants are entitled to get interest on the market value of the land @ 12% per annum from the date of taking its possession i.e. 01.06.1989.**

भूमि अर्जन अधिनियम (1894 का 1), धारा 23(1–ए) – अर्जित भूमि के बाजार मूल्य पर ब्याज – निर्धारण – अधिसूचना, दिनांक 21.09.1990 के शासकीय राजपत्र में प्रकाशित – भूमि का कब्जा लेने की तिथि दिनांक 01.06.1989 है – ब्याज, भूमि का कब्जा लेने की तिथि से या उप–धारा (1) के अंतर्गत अधिसूचना प्रकाशित होने की तिथि से जो भी पहले हो, अर्जित भूमि के केवल बाजार मूल्य पर देय है – दोनों प्रत्यर्थीगण/दावेदार कब्जा लेने की तिथि अर्थात् 01.06.1989 से 12% की वार्षिक दर से भूमि के बाजार मूल्य पर ब्याज पाने के हकदार है।

Ajay Shukla, G.A. for the appellant/State.
None for the respondents.

Short Note

****(62)***

Before Mr. Justice Vivek Rusia

W.P. No. 5048/2010 (Indore) decided on 28 July, 2016

SUNIL JAIN ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Service Law – Compassionate Appointment **– Petitioner's claim for compassionate appointment rejected on the ground that 7 years from the date of death have passed and the policy of State Government regarding compassionate appointment has drastically changed – Held – Petitioner submitted application immediately after the death of his father – Seven years have passed due to exchange of communication between departments of Government of M.P. for which petitioner cannot be held responsible for the delay – Claim of petitioner liable to be considered afresh and delay should not come into play.**

सेवा विधि – अनुकम्पा नियुक्ति – याची का अनुकम्पा नियुक्ति हेतु दावा इस आधार पर अस्वीकार किया गया कि मृत्यु की तिथि से 7 वर्ष बीत चुके हैं और अनुकम्पा नियुक्ति के संबंध में राज्य सरकार की नीति अत्यधिक रूप से परिवर्तित हुई है – अभिनिर्धारित – याची ने अपने पिता की मृत्यु के तुरंत पश्चात् आवेदन प्रस्तुत किया था – म.प्र. शासन के विभागों के बीच पत्राचार के आदान–प्रदान के कारण सात वर्ष बीत गये, जिसके लिए याची को विलम्ब हेतु उत्तरदायी नहीं ठहराया जा सकता – याची का दावा नये सिरे से विचार किये जाने योग्य और विलम्ब का मुद्दा विचार में नहीं लिया जाएगा।

Case referred:

(2015) 7 SCC 412.

Umesh Gajankush, for the petitioner.
R. Mangal, G.A. for the respondent/State.

Short Note
****(63)(DB)***
Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma
W.P. No. 2669/2016 (Indore) decided on 9 May, 2016

TAPAN BHATTACHARYA (DR.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution – Article 226 – Public Interest Litigation – **Government of M.P., publishes text books for schools run by the State Government – Photo of the Chief Minister and good works should be published in every book, so that message would reach to every child of the State – Held – Holder of a constitutional post, who is responsible for over all development of the State, the Chief Minister is well within his right to convey his expectations and thoughts to young generation of the State – No prima facie case for admitting the petition – Petition dismissed.**

संविधान – अनुच्छेद 226 – लोक हित वाद – म.प्र. शासन, राज्य सरकार द्वारा चलाये जा रहे विद्यालयों हेतु पाठ्य पुस्तकें प्रकाशित करता है – प्रत्येक पुस्तक में मुख्यमंत्री का फोटो तथा अच्छे कार्यों का प्रकाशन होना चाहिए, ताकि संदेश, राज्य के प्रत्येक बच्चे तक पहुंचे – अभिनिर्धारित – एक संवैधानिक पदधारक जो कि राज्य के सर्वांगीण विकास के लिए उत्तरदायी है, राज्य की युवा पीढ़ी तक अपनी अपेक्षाऐं एवं विचार पहुँचाने हेतु मुख्यमंत्री अपने अधिकार के भली–भांति भीतर है – याचिका ग्रहण करने हेतु कोई प्रथम दृष्ट्या प्रकरण नहीं है – याचिका खारिज।

The order of the Court was delivered by : ALOK VERMA, J.

Cases referred:

(2015) 7 SCC 1, 2016 (2) SCALE 185, 2008 (12) SCALE 135,

AIR 1985 SC 910.

A.M. Mathur with *Avinash Ghanotkar*, for the petitioner.

Sunil Jain, Addl. A.G. with *C.S. Ujjainiya,* P.L. for the respondents/ State.

Short Note

****(64)(DB)***

Before Mr. Justice P.K. Jaiswal & Mr. Justice Vivek Rusia

W.P. No. 6617/2015 (Indore) decided on 25 July, 2016

VIKALP NAYAK ...Petitioner

Vs.

STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 7805/2015)

Examination Rules, 2012 – Rule 1.8 & 1.9 – PEPT (M.P.) Examinations **– Unfair Means – Held – Rules do not restrict use of two different pens in the answer sheets – Candidate may carry more than one pen in the examination hall and is permitted to use them while giving answers – Use of two or three pens in the answer sheet or just because shades of two pens are different, the same would not fall in the category of Unfair Means – Order cancelling the results is quashed – Writ Petitions allowed.**

परीक्षा नियम, 2012 – नियम 1.8 एवं 1.9 – पी.ई.पी.टी. (म.प्र.) परीक्षाएँ – अनुचित साधन – अभिनिर्धारित – नियम, उत्तर पुस्तिकाओं में दो भिन्न कलमों के प्रयोग को प्रतिबंधित नहीं करते – अभ्यर्थी, परीक्षा हॉल में एक से अधिक कलम साथ ले जा सकता है तथा उत्तर लिखते समय उनका प्रयोग करने की अनुमति है – उत्तर पुस्तिका में दो या तीन कलमों का प्रयोग या केवल इसलिए कि दो कलमों का रंग भिन्न है, अनुचित साधन की श्रेणी में नहीं आएगा – परिणाम निरस्त करने का आदेश अभिखंडित – रिट याचिकाएँ मंजूर।

The order of the Court was delivered by : VIVEK RUSIA, J.

Case referred:

W.P. No. 9690/2014 decided on 24.09.2014,

Piyush Mathur with *P.R. Bhatnagar*, for the petitioner in W.P. No.

6617/2015.

Ajay Bagadiya, for the petitioner in W.P. No. 7805/2015.
Aniket Naik, for the respondent Nos. 1 & 2.
Akash Sharma, for the respondent No. 3.
Swati Mehta, for the respondent No. 4.

I.L.R. [2017] M.P., 773
SUPREME COURT OF INDIA
Before Mr. Justice J. Chelameswar, Mr. Justice Shiva Kirti Singh & Mr. Justice Abhay Manohar Sapre
Cr.A. Nos. 292-293/2014 decided on 16 September, 2016

TATTU LODHI @ PANCHAM LODHI ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Sections 302, 366(A), 363, 364, 376(2)(f)/511 & 201 – **Facts – Minor girl aged 7 years kidnapped and after sexual abuse, throttled to death – Trial Court – Conviction & sentence u/S 302, 363, 364, 376(2)(f)/511 and 201 – Death Sentence – Reference to High Court – Confirmation – Challenged in appeal – Held – Not rarest of rare case – Conviction confirmed – Death sentence commuted into imprisonment for actual period of 25 years – Sentence modified – Appeal dismissed. (Para 9 & 10)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 366(ए), 363, 364, 376(2)(एफ)/511 व 201 – तथ्य – 7 वर्ष की आयु की अप्राप्तवय बालिका का व्यपहरण किया गया तथा लैंगिक दुराचार के पश्चात् गला घोंट कर मृत्यु कारित की गई – विचारण न्यायालय – धारा 302, 363, 364, 376(2)(एफ)/511 व 201 के अंतर्गत दोषसिद्धि एवं दण्डादेश – मृत्युदण्ड – उच्च न्यायालय को निर्देश – पुष्टि – अपील में चुनौती दी गई – अभिनिर्धारित – विरल से विरलतम प्रकरण नहीं – दोषसिद्धि की पुष्टि की गई – मृत्युदण्ड को 25 वर्षों की वास्तविक अवधि के कारावास में लघुकृत किया गया – दण्डादेश उपांतरित – अपील खारिज।

B. Interpretation of Statutes – Criminal law – Life imprisonment – Meaning of – **Life imprisonment shall actually mean imprisonment for whole of the natural life or to a lesser extent as indicated by the Court in the light of facts of a particular case. (Para 6 & 7)**

ख. कानूनों का निर्वचन – आपराधिक विधि – आजीवन कारावास – अर्थ – आजीवन कारावास का वास्तविक अर्थ संपूर्ण प्राकृतिक जीवन का कारावास या किसी विशिष्ट प्रकरण के तथ्यों के आलोक में न्यायालय द्वारा उपदर्शित लघुतर सीमा से होगा।

Cases referred:

(2008) 13 SCC 767, (2016) 7 SCC 1, (2012) 4 SCC 37, (2013) 5

SCC 546.

JUDGMENT

The Judgment of the Court was delivered by : SHIVA KIRTI SINGH, J. :- The appellant, charge-sheeted for offences under Section 366(A), 363, 364, 376(2)(f)/511 and 201 of the Indian Penal Code (for brevity 'IPC') was tried by the Twelfth Additional Sessions Judge, Jabalpur in Sessions Trial No. 324 of 2011. He was found guilty of committing the murder of a minor girl, aged about seven years and also of kidnapping and attempt to commit rape on her and for destruction of evidence relating to the crime. The trial court awarded punishment of death under Section 302 IPC, RI for life and a fine of Rs.1,000/- with default stipulation for offence under Section 364 IPC, RI for seven years with similar fine for offence under Section 363 IPC, RI for seven years with similar fine for offence under Section 376(2)(f)/511 IPC and RI for seven years with similar fine for offence under Section 201 IPC. All the punishments of imprisonment were directed to run concurrently. By the impugned judgment the High Court of Madhya Pradesh agreed with the findings of the trial court and answered the criminal reference in affirmative, confirming the death sentence and dismissed the criminal appeal preferred by the appellant.

2. Learned senior advocate for the appellant, Ms. Meenakshi Arora initially made an attempt to challenge the conviction of the appellant itself by pointing out absence of any eye-witness of the incident and dependence of the entire prosecution case on circumstantial evidence alone. Learned counsel for the State countered the challenge to conviction by submitting that in law there is no hurdle in securing conviction purely on circumstantial evidence. On facts, he highlighted that the trial court considered the entire evidence on record fairly and in detail and found the following five circumstances proved against the accused:

(i) The accused asked the victim soon before the incident to purchase and bring "Gutka" for him and after sometime she became untraceable.

(ii) Victim was last seen alive with the accused

(iii) The accused avoided to hand over the keys of his house for the search of victim.

(iv) Recovery and seizure of victim's dead body in a gunny bag from the house of the accused.

(v) Seizure of blood-stained clothes including bed sheet from the house of accused pursuant to his memorandum statement.

3. In view of submission advanced on behalf of the appellant that the chain of evidence to prove his guilt beyond reasonable doubt was not complete, we have examined the relevant evidence and also the discussion thereof made by the trial court in detail from paragraphs 15 to 32 of its judgment and similar exercise by the High Court. On a careful consideration of the evidence of shopkeeker Anil Kumar Jain (PW-7) from where the victim bought "Gutka" for the accused and the evidence of complainant Gappu @ Kshirsagar, Hemraj, Ram Kumar, Sitaram, Maharaj Singh along with medical evidence, seizure report and report from the forensic science laboratory confirming the presence of human blood on the gunny bag, bed-sheet and bed-cover which were seized from the house of accused, we find no good reason to interfere with the findings of the trial court duly confirmed by the High Court that the appellant-accused kidnapped the victim and after subjecting her to sexual abuse, throttled her to death. The first submission on behalf of the appellant that the chain of circumstantial evidence is not complete and does not prove the guilt of accused is found to be without any substance. We have no hesitation in confirming the conviction.

4. Since there was no appeal before the High Court from the side of the State or the complainant nor there is any such appeal in this Court, We have confirmed the conviction as made by the trial court but we have no hesitation in indicating our disapproval of the error committed by the trial court in convicting the accused only for the attempted rape. The post-mortem report, besides showing injuries on the neck and face showed several bruise marks on the left and right side of the abdomen as well as an injury on the left side of the vagina. The internal examination clearly records thus: "..... in the reproductive organ the hymen membrane was ruptured. Mild bleeding and inflammation were found. Vagina was congested and one finger could be inserted. White discharge was coming out of vagina." In view of aforesaid findings recorded in the post-mortem report of the seven year old victim duly proved by Dr. Khare (PW-9), there was no justification not to hold the accused guilty of rape simply because PW-9 in his oral deposition made a casual statement that there was attempt to commit rape on the deceased before her

death. It may only be noticed that the Doctor confirmed that the death of the deceased was caused by asphyxia from choking out the throat by strangulation of the neck and all the injuries were ante mortem in nature. It may also be noted here that the post-mortem report (Ex. P-13) was prepared and signed not only by Dr. Rakesh Khare (PW-9) but also by his colleague Dr. Ashish Raj who had also participated in the autopsy of the deceased.

5. Be that as it may, we have now to consider the next plea advanced on behalf of the appellant that the facts of the case do not make the crime to be "rarest of rare" and hence in such a case the Courts below should not have awarded the death sentence. In support of the aforesaid plea, learned senior counsel has submitted that at the time of occurrence accused was aged only about twenty seven years and there was no material to negate the chance of accused being reformed on account of sentence of imprisonment and gaining further maturity. On the basis of injuries which can be associated with rape, learned senior counsel submitted that no doubt it was a heinous offence as the victim was only seven years old but there were neither any broken bones nor brutal tearing etc. to make out a case of extreme brutality. Learned senior counsel referred to the statement of the accused recorded under Section 313 of the Code of Criminal Procedure to point out that since sometime back the accused was living alone as his wife had deserted him and he also admitted that there was only one case under Section 354 IPC pending against him. Reference was also made to memorandum statement of the accused recorded by the police in presence of some witnesses to show that as per such statement the accused killed the deceased because of loud cries by her. According to learned counsel the murder was in a state of panic and not a premeditated act and therefore, the appellant deserves a lenient punishment, anything other than death.

6. Ms. Arora, learned senior counsel for the appellant placed reliance upon judgment in the case of *Swamy Shraddananda(2) v. State of Karnataka*[1] to underscore that although Swamy Shraddananda's conviction under Sections 302 and 201 of the IPC was affirmed with a finding that the crime was a cold blooded murder yet this Court was not convinced to confirm the sentence of death even after discussing the diabolical crime in which a wealthy married woman fell in trap, divorced her husband married the accused and suffered death at his hands only for lust of her huge property. The dead body was

1. (2008) 13 SCC 767

found buried under the floor of her residential house, obviously to conceal the ghastly crime. In such a crime, while mulling over the vexed issue of adequate sentence in lieu of death sentence, this Court held that the Court had the power to substitute death by imprisonment for life and also to direct that the convict would not be released from prison for the rest of his life. A Constitution Bench judgment in the case of *Union of India v. V. Sriharan alias Murugan & Ors.*[2] has also been cited to show that judgment in the case of *Swamy Shraddananda (2)* (supra) has been approved and followed. In paragraphs 89 and 90 of this judgment it was explained that life imprisonment means the whole life span of the person convicted and therefore in the facts of a case while not confirming death penalty, this Court may, while exercising its power to impose the punishment of life imprisonment, specify the period upto which the sentence of life must remain intact so as to be proportionate to the nature of the crime committed.

7. The submissions advanced on behalf of the State will be considered hereinafter, but keeping in mind all the submissions, it is clear that there is no opposition to the contention advanced by learned senior counsel for the appellant on the basis of *Swamy Shraddananda(2)* (supra) and the Constitution Bench Judgment in *Sriharan* (supra). In that view of the matter and even otherwise we are in respectful agreement with the views expressed in those judgments. The judicial innovation of bridging the gap between death sentence on the one extreme and only 14 years of actual imprisonment in the name of life imprisonment on the other, in our view serves a laudable purpose as explained in those judgments and does not violate any positive mandate of law in the Indian Penal Code or in the Code of Criminal Procedure. Hence, for doing complete justice in any case, this court can definitely follow the law laid down in the aforesaid judgments even by virtue of Article 142 of the Constitution of India. The innovative approach reflected in the aforesaid judgments, on the one hand helps the convict in getting rid of death penalty in appropriate cases, on the other it takes care of genuine concerns of the victim including the society by ensuring that life imprisonment shall actually mean imprisonment for whole of the natural life or to a lesser extent as indicated by the court in the light of facts of a particular case. Since there is no party who is actually a looser on account of such an approach in appropriate cases, we feel no hesitation in accepting the submissions advanced by the

2. (2016) 7 SCC 1

appellant. Hence the law is reiterated that in appropriate cases where this court is hesitant in maintaining death sentence, it may order that the convict shall undergo imprisonment for whole of natural life or to a lesser extent as may be specified.

8. Learned counsel for the State has made a strong attempt to support the death sentence. According to him the judgments in the case of *Rajendra Pralhadrao Wasnik v. State of Maharashtra*[3] and *Shankar Kisanrao Khade v. State of Maharashtra*[4] catalogue the relevant factors which should be looked for and examined for awarding or confirming death sentence. He highlighted factors such as brutality, helplessness of the victim, unprovoked and pre-meditated attack as well as societal concern in respect of a particular brutal or heinous crime. According to him the facts of the case showed brutality, helplessness of the victim as well as unprovoked and pre-meditated design to assault. Learned counsel for the State also referred to some other cases where death penalty had been confirmed by this Court on the basis of peculiar facts of those cases. Since there are large number of judgments either confirming death sentence or commuting the same into life imprisonment, rendered on the basis of peculiar facts of those cases, it would not be of any real help to consider those judgments for deciding the issue as to whether in the facts of the present case death sentence should be confirmed or commuted.

9. Having considered the rival submissions as well as judgments relied upon, we are of the considered view that the facts of this case do not make out a "rarest of rare" case so as to confirm the death sentence of the appellant. The death penalty is therefore not confirmed. The question as to what would be the appropriate period out of imprisonment for the whole natural life that the appellant must spend in prison is not an easy one to be answered. As per submissions of learned counsel for the appellant in total an actual period of 20 years behind the bars would serve the ends of justice in the present case. Contra, learned State counsel has argued for whole of natural life.

10. The occurrence is of the year 2011 when the appellant was said to be about 27 years old. Considering the fact that the deceased, a helpless child fell victim of the crime of lust at the hands of the appellant and there may be probabilities of such crime being repeated in case the appellant is allowed to come out of the prison on completing usual period of imprisonment for life

3. (2012) 4 SCC 37 4. (2013) 5 SCC 546

which is taken to be 14 years for certain purposes, we are of the view that the appellant should be inflicted with imprisonment for life with a further direction that he shall not be released from prison till he completes actual period of 25 years of imprisonment. With this modification in the sentence, the appeals of the appellant are dismissed.

Appeal dismissed.

I.L.R. [2017] M.P., 779
SUPREME COURT OF INDIA
Before Mr. Justice Ranjan Gogoi & Mr. Justice Prafulla C. Pant
C.A. No. 3797/2015 decided on 3 October, 2016

RAJENDRA KUMAR MESHRAM ...Appellant
Vs.
VANSHMANI PRASAD VERMA & anr. ...Respondents

A. ***Representation of the People Act (43 of 1951), Section 33(4)*** **– Returning Officer to satisfy himself that candidate's name and electoral roll number is identical with the one entered in the nomination paper – If candidate is a voter from the same constituency from where he seeks election, electoral roll would be readily available with the returning officer. (Para 14)**

क. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(4)* – निर्वाचन अधिकारी को स्वयं की संतुष्टि करनी चाहिए कि प्रत्याशी का नाम व निर्वाचक नामावली संख्या, जैसा नामांकन पत्र में प्रविष्ट किया गया है, वैसा ही है – यदि प्रत्याशी उसी निर्वाचन क्षेत्र का मतदाता है जहां से वह निर्वाचन चाहता है, तब निर्वाचन अधिकारी के पास निर्वाचक नामावली आसानी से उपलब्ध होगी।

B. ***Representation of the People Act (43 of 1951), Section 33(5)*** **– Candidate a voter from other constituency – He is required to enclose alongwith the nomination or at the time of scrutiny, the electoral roll or certified copy of the same. (Para 14)**

ख. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5)* – प्रत्याशी अन्य निर्वाचन क्षेत्र का मतदाता – उससे नामांकन के साथ अथवा संविक्षा के समय, निर्वाचक नामावली या उसकी प्रमाणित प्रति संलग्न करना अपेक्षित है।

C. ***Representation of the People Act (43 of 1951), Section 100(1)(d)*** **– An election is liable to be declared void on the ground of**

improper acceptance of nomination provided such acceptance has materially affected the result of the election. (Para 9)

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100(1)(डी) – नामांकन की अनुचित स्वीकृति के आधार पर कोई निर्वाचन शून्य घोषित किये जाने योग्य है, परंतु यह तब जब उक्त स्वीकृति से निर्वाचन का परिणाम तात्विक रूप से प्रभावित हुआ हो।

D. Representation of the People Act (43 of 1951), Section 100(1)(c) **– Improper rejection of a nomination itself is a sufficient ground for invalidating the election without any further requirement of proof of material effect of such a rejection on the result of the election. (Para 9)**

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100(1)(सी) – नामांकन पत्र की अनुचित अस्वीकृति, निर्वाचन के परिणाम पर उक्त अस्वीकृति के तात्विक प्रभाव के सबूत की किसी अतिरिक्त आवश्यकता के बिना, निर्वाचन को अविधिमान्य ठहराने के लिए अपने आप में पर्याप्त आधार है।

E. Representation of the People Act (43 of 1951), Sections 100(1)(c), 100(1)(d) & 33(5) **– High Court did not keep in mind the distinction between Section 100(1)(c) and 100(1)(d) – Before setting aside election on the ground that appellant/returned candidate had not filed the electoral roll or a certified copy thereof and did not comply with the mandatory provisions of Section 33(5), High Court ought to have found whether improper acceptance of nomination had materially affected the result of election – High Court failed to determine Issue No. 6 and therefore it was not empowered to declare the election of the returned candidate as void, even if it is assumed that acceptance of his nomination was improper. (Para 9)**

ङ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 100(1)(सी), 100(1)(डी) व 33(5) – उच्च न्यायालय ने धारा 100(1)(सी) एवं 100(1)(डी) के विभेद को ध्यान में नही रखा – निर्वाचन को इस आधार पर अपास्त किये जाने से पूर्व कि अपीलार्थी/निर्वाचित प्रत्याशी ने निर्वाचक नामावली या उसकी प्रमाणित प्रति प्रस्तुत नहीं की थी और धारा 33(5) के आज्ञापक उपबंधों का अनुपालन नहीं किया था, उच्च न्यायालय को यह पता लगाना चाहिए कि क्या नामांकन की अनुचित स्वीकृति ने निर्वाचन के परिणाम को तात्विक रूप से प्रभावित किया – उच्च न्यायालय विवाद्यक क्र. 6 का निर्धारण करने में विफल रहा और इसलिए यदि यह धारणा की जाए कि उसके नामांकन को स्वीकार करना उचित नहीं था, तब भी वह निर्वाचित

प्रत्याशी के निर्वाचन को शून्य घोषित करने के लिए सशक्त नहीं था।

F. Representation of the People Act (43 of 1951), Section 5 & 100(1)(a) – **Whether failure of the returned candidate to furnish electoral roll of the constituency, where his name appears as a voter or a certified copy thereof would by itself establish that he was not qualified to take part in the election having failed to prove that he is a voter – Under section 100(1)(a), election of returned candidate is liable to be declared void if he was not qualified for the membership of Parliament or State legislature – Section 5 requires a candidate to be an elector of any assembly constituency of the State – To declare an election void u/S 100(1)(a), it has to be established that the returned candidate is not a voter of any assembly constituency of the State.** (Para 10 & 11)

च. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 5 व 100(1)(ए)* – क्या निर्वाचित प्रत्याशी द्वारा, निर्वाचन क्षेत्र की निर्वाचक नामावली या उसकी प्रमाणित प्रति जिसमें उसका नाम मतदाता के रूप में प्रकट होता है, प्रस्तुत किये जाने में विफलता, स्वयं स्थापित करेगी कि वह निर्वाचन में भाग लेने के लिए अर्हित नहीं था चूंकि वह यह साबित करने में विफल रहा कि वह एक मतदाता है – धारा 100(1)(ए) के अंतर्गत निर्वाचित प्रत्याशी का निर्वाचन शून्य घोषित किये जाने योग्य है यदि वह संसद अथवा राज्य विधानमंडल की सदस्यता हेतु अर्हित नहीं था – धारा 5 अपेक्षा करती है कि प्रत्याशी राज्य के किसी विधान सभा निर्वाचन क्षेत्र का एक निर्वाचक हो – धारा 100(1)(ए) के अंतर्गत निर्वाचन शून्य घोषित किये जाने हेतु यह स्थापित किया जाना होता है कि निर्वाचित प्रत्याशी राज्य के किसी विधान सभा निर्वाचन क्षेत्र का मतदाता नहीं।

G. Pleading and Proof – **At the time of scrutiny, no objection was taken to the effect that returned candidate was not qualified to contest election as he was not a voter of any assembly constituency and returned candidate was ineligible to participate in the election having not furnished the electoral roll /certified copy of the constituency in which he was a voter – There was no pleading to the effect that the appellant was not a voter of any assembly constituency and therefore he was not qualified – Held – Trial of an election petition has to be in accordance with the provisions of the Civil Procedure Code 1908 – When no pleadings were made that election of the returned candidate was void on the grounds mentioned u/S 100(1)(a) and no issue on the same was struck and no opportunity was availed to returned candidate to adduce relevant evidence, High Court could not have found that**

election of returned candidate was void u/S 100(1)(a) – Finding of the High Court that the election petitioner had made out a case for declaration that the election of returned candidate was void u/S 100(1)(a) cannot be upheld – Appeal allowed – Election of appellant/ returned candidate declared valid in law. (Para 14 & 15)

छ. *अभिवचन एवं सबूत* – संविक्षा के समय इस प्रभाव का कोई आक्षेप नहीं लिया गया कि निर्वाचित प्रत्याशी निर्वाचन लड़ने के लिए अर्हित नहीं था क्योंकि वह किसी विधान सभा निर्वाचन क्षेत्र का मतदाता नहीं था एवं निर्वाचित प्रत्याशी निर्वाचन में भाग लेने के लिए अपात्र था क्योंकि उसने उस निर्वाचन क्षेत्र जिसमें वह मतदाता था की निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत नहीं की – इस प्रभाव का कोई अभिवचन नहीं था कि अपीलार्थी किसी विधान सभा निर्वाचन क्षेत्र का मतदाता नहीं था और इसलिए वह अर्हित नहीं था – अभिनिर्धारित – निर्वाचन याचिका का विचारण, सिविल प्रक्रिया संहिता, 1908 के उपबंधों के अनुसार होना चाहिए – जब कोई अभिवचन नहीं किये गये थे कि निर्वाचित प्रत्याशी का निर्वाचन, धारा 100(1)(ए) में उल्लिखित आधारों पर शून्य था एवं उक्त पर कोई विवाद्यक नहीं बनाया गया था तथा निर्वाचित प्रत्याशी को सुसंगत साक्ष्य प्रस्तुत करने का अवसर प्रदान नहीं किया गया था, उच्च न्यायालय यह निष्कर्ष नहीं निकाल सकता कि निर्वाचित प्रत्याशी का निर्वाचन धारा 100(1)(ए) के अंतर्गत शून्य था – उच्च न्यायालय का निष्कर्ष कि निर्वाचन याची ने निर्वाचित प्रत्याशी का निर्वाचन, धारा 100(1)(ए) के अंतर्गत शून्य घोषित किये जाने के लिए प्रकरण साबित किया है, की पुष्टि नहीं की जा सकती – अपील मंजूर – अपीलार्थी/निर्वाचित प्रत्याशी का निर्वाचन विधिमान्य घोषित किया गया।

JUDGMENT

The Judgment of the Court was delivered by : RANJAN GOGOI, J. :- The election of the appellant to the No.81 Deosar Constituency of Madhya Pradesh Legislative Assembly which was held on 11.05.2013 has been set aside by the High Court in an election petition filed by the respondent No.1 herein. The validity of the said order of the High Court is the subject matter of the present appeal.

2. On a reading of the election petition filed by the respondent No.1, it would appear to us that several grounds were urged to invalidate the election in question. According to the respondent-election petitioner, one of the nominations filed by him as a candidate of the Indian National Congress Party was wrongly rejected on the ground that the symbol allotment letter was submitted by the election petitioner after the stipulated time. However as two

other nominations filed by the respondent-election petitioner as an independent candidate was accepted, he contested the election in which he lost. Consequently, he challenges the rejection of his nomination as a Indian National Congress Party candidate as being wrongful. Apart from the above ground, the election petition was also filed alleging that the appellant-returned candidate was a government servant. In addition to the above, it was pleaded that the appellant-returned candidate had failed to furnish, along with the nomination paper, a copy/certified copy of the electoral roll of No.80 Singrauli constituency in which electoral roll his name was claimed to be appearing against serial No.118. According to the election petitioner on account of the aforesaid omission the returned candidate was not eligible to participate in the election. His nomination, therefore, was wrongly accepted.

3. The High Court answered the first two questions in favour of the returned candidate. However, insofar as the third question set forth above is concerned, the conclusion of the High Court is adverse to the returned candidate. In this connection the High Court came to the conclusion that the returned candidate had not filed the electoral roll or certified copy thereof of No.80 Singrauli Constituency and therefore the returning officer had committed an illegality in accepting the nomination of the returned candidate and in not rejecting the same on account of non-compliance of Sections 33(5) and 36(2)(b) of the Representation of People Act, 1951 (For short, "the 1951 Act"). On the said basis the High Court came to the conclusion that the election of the returned candidate was liable to be declared void under Section 100(1)(a) along with Section 100(1)(d)(i) of the 1951 Act. Consequential directions therefore have been issued. Aggrieved this appeal has been filed.

4. We have heard Shri Shekhar Naphade, learned senior counsel appearing for the appellant, Shri Vivek Tankha, learned senior counsel appearing for the respondent No.1 and Shri Mishra Saurabh, learned counsel for the respondent No.2.

5. As no cross appeal has been filed by the respondent-election petitioner challenging the findings of the High Court adverse to him, the scope of the present appeal is confined to the correctness of the order of the High Court insofar as the third question set forth above is concerned.

6. At the outset the relevant part of the pleadings contained in the election petition insofar as the said issue is concerned may be set out as hereunder :-

1.11 That, the election of the respondent as a member of M.P. Legislative Assembly for Devsar Constituency deserves to be declared as void for the reason that the Returning Officer has wrongly rejected the petitioner's nomination form as candidate sponsored by Indian National Congress and also for wrongly accepting the nomination from the respondent. It is also submitted that the respondent not only failed to submit order by Competent Authority accepting his resignation but also failed to furnish a certified copy of the voter list to entitle him to contest the election from Devsar constituency as he is registered voter of 80, Singrauli constituency and without filing the certified copy of relevant part of voter list he was not eligible to contest from other constituency. Acceptance of respondent's nomination form has materially affected the election result.

1.12 That the respondent has been illegally allowed to contest the election while the petitioner has been wrongly denied the right to contest the election and therefore, this petition.

1.13 That, the rejection of nomination form of the petitioner was illegal and contrary to election law and rules framed thereunder and as such declaring the respondent No.1 (one) as returned candidate from 81, Devsar constituency deserves to be quashed and deserves to be declared as null and void.

1.14 That, the nomination form of the respondent has been wrongly accepted by the Returning Officer ignoring the legal provision. It is submitted that the respondent has not produced any valid documents to prove that he was not in service on the date of filing of his nomination form and he has also not furnished the certified copy of the relevant part of the voter list of the constituency in which he was registered as voter to entitle him to contest election from other constituency i.e. 81, Devsar Constituency."

7. In a written statement filed by the returned candidate, all the aforesaid averments have been denied. On the basis of the pleadings of the parties the following issues were framed by the Court:-

(1) Whether the returning officer has malafidely rejected

the petitioner's nomination form as the candidate sponsored by the Indian National Congress under the influence of the then ruling party ?

(2) Whether respondent No.1 was in government service at the time of acceptance of his nomination form by the returning officer ?

(3) Whether respondent No.2 has committed illegality in accepting the nomination form of respondent No.1 ?

(4) Whether respondent No.1 has failed to prove that his name was in the voter list of 80 Singrauli Constituency ? (if so, effect)

(5) Whether respondent No.1 has failed to submit valid Caste Certificate for contesting the election from the constituency reserved for scheduled caste category ?

(6) Whether result of election of 81 Deosar Constituency was materially affected due to improper acceptance of nomination of respondent No.1 ?

(7) Relief and costs ?

8. As issue Nos.1 and 2 extracted above, have been answered in favour of the returned candidate and there is no cross appeal, it is only the remaining issues that survive for consideration. All the said issues center round the question of improper acceptance of the nomination form of the returned candidate. In this regard, issue No.6 which raises the question of material affect of the improper acceptance of nomination of the returned candidate on the result of the election may be specifically noticed.

9. Under Section 100 (1)(d), an election is liable to be declared void on the ground of improper acceptance of a nomination if such improper acceptance of the nomination has materially affected the result of the election. This is in distinction to what is contained in Section 100(1)(c) i.e. improper rejection of a nomination which itself is a sufficient ground for invalidating the election without any further requirement of proof of material effect of such rejection on the result of the election. The above distinction must be kept in mind. Proceeding on the said basis, we find that the High Court did not endeavor to

go into the further question that would be required to be determined even if it is assumed that the appellant-returned candidate had not filed the electoral roll or a certified copy thereof and, therefore, had not complied with the mandatory provisions of Section 33(5) of the 1951 Act. In other words, before setting aside the election on the above ground, the High Court ought to have carried out a further exercise, namely, to find out whether the improper acceptance of the nomination had materially affected the result of the election. This has not been done notwithstanding issue No.6 framed which is specifically to the above effect. The High Court having failed to determine the said issue i.e. issue No.6, naturally, it was not empowered to declare the election of the appellant returned candidate as void even if we are to assume that the acceptance of the nomination of the returned candidate was improper.

10. An argument has been advanced on behalf of the respondent-election petitioner that the High Court has also found the election to be void on the grounds mentioned in Section 100(1)(a). In this regard it has been submitted that the failure of the returned candidate to furnish the electoral roll of the constituency where his name appears as a voter or the certified copy thereof would, by itself, establish that he was not qualified to take part in the election as he had failed to prove that he is a voter. Therefore his election was liable to be declared void under Section 100(1)(a) of the 1951 Act which the High Court had done.

11. Under Section 100(1)(a) the election of the returned candidate is liable to be declared void if, *inter alia*, he was not qualified for membership of Parliament or the State Legislature as may be. Section 5 of the 1951 Act deals with qualifications for membership of a Legislative Assembly of a State which, inter alia, requires a candidate to be an elector of any Assembly constituency of the State. To declare an election void under Section 100(1)(a), it must, therefore, be established that the returned candidate is not a voter of any assembly constituency of the State.

12. After the receipt of nomination, the election petitioner has objected to the acceptance of the nomination of the appellant-returned candidate on the ground that the returned candidate was a Government servant and therefore disqualified from contesting the election. This was rejected by the Returning Officer on 11.11.2013 holding that the returned candidate had duly submitted his resignation which was accepted before the date of filing of nomination. No objection to the effect that the returned candidate was not qualified to contest

the election as he was not a voter of any assembly Constituency of the State was raised in the objection filed. Neither was any objection taken to the effect that the returned candidate was not eligible to participate in the election as he had not furnished the electoral roll of the Constituency in which he was a voter or a certified copy thereof. However, in the election petition filed, it was pleaded in para 1.11 of the election petition, (extracted above) that the returned candidate had "failed to furnish a certified copy of the voter list to entitle him to contest the election from Devsar constituency as he is registered voter of 80, Singrauli constituency and without filing the certified copy of relevant part of voter list he was not eligible to contest from other constituency." There was no pleading at all to the effect that the appellant is not a voter of any assembly constituency and therefore is not qualified.

13. From the above, it is clear that it was not the case of the respondent-election petitioner that the appellant-returned candidate was not qualified to contest the election. It is only before this Court, and that too in the oral arguments made, that it has been urged, by relying on the order of the High Court, that the returned candidate was not qualified to contest the election under Section 100(1)(a) of the 1951 Act and therefore his election was rightly set aside by the High Court.

14. The trial of an election petition, as per Section 87 of 1951 Act has to be in accordance with the provisions of the Code of Civil Procedure, 1908. When no pleadings that the election of the returned candidate was void on grounds mentioned in Section 100(1)(a) were made and no issue on this score was struck and no opportunity to the returned candidate to adduce relevant evidence was afforded, the High Court, in our considered view, could not have found that the election of the returned candidate was void under Section 100(1)(a). In fact, from a reading of para 1.11 of the election petition as extracted above, it clearly appears that the election petitioner had stated that the appellant-returned candidate is a voter of No.80 Singrauli constituency but he had omitted to enclose the electoral roll or a certified copy thereof along with his nomination papers which made him ineligible to contest the election. This part of the pleading must be seen in the light of the provisions of Section 33(4) and 33(5) of the 1951 Act. Under Section 33(4) the returning officer must satisfy himself that a candidate's name and electoral roll numbers is the same as claimed/entered in the nomination paper. If the candidate is a voter of the same constituency from which he seeks election, there is no

difficulty the electoral rolls would be readily available with the returning officer. But if the candidate is a voter of another constituency, then Section 33(5) requires him to enclose along with the nomination or at the time of scrutiny, the electoral roll or certified copy of the same pertaining to that constituency. The entire case of the election petitioner as pleaded is that the appellant-returned candidate was a voter of another constituency i.e. No.80 Singrauli constituency but he had not enclosed or produced the electoral roll of that constituency or a certified copy thereof thereby making him ineligible to contest the election.

15. In view of the state of the pleadings as noticed above; the issues framed and the evidence led by the parties, we cannot agree with the High Court that the respondent-election petitioner had made out a case for declaration that the result of the election in favour of the returned candidate was void under Section 100(1)(a) of the 1951 Act. Having reached our conclusion on above said basis, it is not necessary to go into the question raised on behalf of the respondent-election petitioner that failure to produce the copy of the electoral roll of the constituency in which a candidate is a voter or a certified copy thereof, by itself, would amount to a proof of lack of/absence of qualification under Section 5 of the 1951 Act. All that would be necessary for us to say in this regard is that any such view would not be consistent with the legislative intent expressed by the enactment of two separate and specific provisions contained in Section 100 (1) (a) and 100 (1) (d) of the 1951 Act.

16. Though a number of precedents have been cited on behalf of the respondent-election petitioner to sustain the arguments advanced, it will not be necessary for us to take any specific note of the principles of law laid down in any of the said cases inasmuch as all the said cases relate to rejection of nominations on account of failure to comply with the provisions of Section 33(5) of the Act of 1951 which is not in issue before us in the present appeal.

17. Consequently and for the aforesaid reasons, we cannot sustain the order of the High Court. Accordingly, the same is set aside and the appeal is allowed. The election of the appellant-returned candidate is declared to be valid in law.

Appeal allowed.

I.L.R. [2017] M.P., 789
WRIT APPEAL
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Rajeev Kumar Dubey
W.A. No. 134/2017 (Indore) decided on 27 April, 2017

VIPPY INDUSTRIES LTD. ...Appellant
Vs.
ASSESSING OFFICER, UNDER BUILDING & OTHER CONSTRUCTIONS WORKERS' WELFARE CESS ACT, 1996
...Respondent

(Alongwith W.A. No. 135/2017)

Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act (27 of 1996), Section 2(1)(d) and Factories Act (63 of 1948), Section 2(k) & (m) **– Appellant challenging the dismissal of writ petition in which the show cause notice was challenged on the ground that Section 2(1)(d) is not applicable in respect of building or other construction work to which the Factories Act would apply – Held – Since the construction under taken by appellant was not undertaken by the employees of the appellant but by an independent contractor, therefore, the workers engaged in the construction work were not covered under the Factories Act and would be covered under Section 2(1)(d) of the Act – Appeal dismissed. (Paras 3 to 11)**

भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्त) अधिनियम (1996 का 27), धारा 2(1)(डी) एवं कारखाना अधिनियम (1948 का 63), धारा 2(के) व (एम) – अपीलार्थी द्वारा रिट याचिका की खारिजी को चुनौती दी गई जिसमें कि कारण बताओ नोटिस को इस आधार पर चुनौती दी गई थी कि भवन एवं अन्य संनिर्माण कार्य जिनमें कारखाना अधिनियम लागू होगा उसके संबंध में धारा 2(1)(डी) प्रयोज्य नहीं है – अभिनिर्धारित – चूंकि अपीलार्थी द्वारा लिये गये संनिर्माण के उपक्रम को अपीलार्थी के कर्मचारियों द्वारा नहीं बल्कि एक स्वतंत्र ठेकेदार द्वारा चलाया जा रहा था, इसलिए, संनिर्माण कार्य में लगे हुए कर्मकार कारखाना अधिनियम के अंतर्गत आच्छादित नहीं होते तथा अधिनियम की धारा 2(1)(डी) के अंतर्गत आच्छादित होंगे – अपील खारिज।

Case referred:

(2016) 10 SCC 329.

Sudeep Bhargava, for the appellant.

ORDER

The Order of the Court was delivered by : HEMANT GUPTA, C.J. :- This order shall dispose of the above two appeals raising identical questions of law and facts. In Writ Appeal No.135/15, the challenge is also an order passed by the appellate authority raising a demand of Rs.34,59,000/- on 27.03.2015. Hence, for the facility of reference, facts are taken from W.A.No.134/2017.

2. The order dated 11.01.2017 passed by the learned Single Bench is the subject matter of challenge in the present writ appeal 134 of 2017, wherein the appellant challenged the show cause notice 01.09.2015 for not complying with the provisions of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short **'the Act'**).

3. The petitioner is a public limited company and is having license to run the factory since long. In the factory premises, the appellant started construction of a Godown for keeping raw material or finished products after seeking approval of the building plans from the Chief Inspector of Factories under Section 6 of the Factories Act, 1948 (for short **'the Factories Act'**). The appellant commenced construction works of the Godown. It is at that stage a show cause notice was served on 3.8.2014 that the appellant is violating the provisions of section 7 & 46 of the Act. The appellant submitted a reply asserting that the Act is not applicable and the employees of the factory are governed under the provisions of the Factories Act as construction is being raised with the approval of the authorities under the Factories Act. Thereafter, the impugned show cause notice was issued which is challenged by the appellant by way of writ petition before this Court. The learned Single Bench dismissed the writ petition, after returning the following finding:-

> 16. The construction of civil work is altogether different work, which is nothing to do with the main industrial activity of the factory. The permission, which was given to the petitioner by the Chief Factory Inspector dated 23.09.2008 was under the provisions of the Factories Act with certain terms and conditions. Condition No.6 specifically provides that this permission does not absolve the petitioner from any other enactment or rules. That does not mean, after taking permission

under the Factories Act, they are not covered in any other enactment.

18. It is not the case of the petitioner that in the construction activity his own regular workers are engaged who are already covered under the provisions of Factories Act, 1948 but the workers who are engaged in the construction work are not the workers & employees of the petitioner and hence, would not be covered under the provisions of Factories Act, 1948, therefore, the benefit and the welfare measures provided under the BOCW Act cannot be denied to them, therefore, the authorities under the BOCW Act & Rules has not committed any error while issuing notice to the petitioner.

4. Learned counsel for the appellant before this Court vehemently argued that in terms of Section 2(d) of the Act, the Act is not applicable in respect of any building or other construction work to which the Factories Act or the Mines Act would apply. It is also contended that the Act is an enactment for the benefit of unorganized workers and the Workmen Compensation Act, Minimum Wages Act etc. are applicable to the workers engaged by the appellant, therefore, in terms of the provisions of Schedule-II to the Unorganized Workers' Social Security Act, 2008, the construction activity undertaken by the appellant is not covered under the Act.

5. It is contended that the judgment of the Supreme Court in *Lanco Anpara Power Limited vs. State of Uttar Pradesh and others* reported in (2016) 10 SCC 329 has been wrongly relied by the learned Single Bench as that was a case where the manufacturing activity was not started, therefore, the building was not covered under the Factories Act but in the present case since the factory was in production, therefore, the Factories Act is applicable and the provisions of the Act cannot be made applicable to the construction activity undertaken by the appellant.

6. To a pointed query, learned counsel for the appellant admitted that the construction of the Godown was not raised by the workers of the appellant but by workers engaged by a contractor to whom the contract for construction of Godown was given. With these facts, we have examined the arguments raised by the appellant.

7. Firstly, the relevant statutory provisions need to be extracted. Section

2(d) of the Act reads as under:

2. Definitions-(1) In this Act, unless the context otherwise requires, -

xxx xxx xxx xxx

xxx xxx xxx xxx

(d) "building or other construction work" means the construction, alteration, repairs, maintenance or demolition, or or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmissions towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply;

8. The provisions Section 2(k) & (m) of the Factories Act are as under:

2. Interpretation-In this Act, unless there is anything repugnant in the subject or contest

xxx xxx xxx xxx

Xxx xxx xxx xxx

(k) "manufacturing process" means any process for –

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water, sewage or any other substance; or

(iii) generating, transforming or transmitting power, or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding (or)

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; (or)

(vi) preserving or storing any article in cold storage;

(l) xxx

(m) "factory" means any premises including the precincts thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,

but does not include a mine subject to the operation of (the Mines Act, 1952 (35 of 1952) or (a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place).

9. The Factories Act is applicable to any premises including premises where ten or more workers are working or were working on any day of the preceding twelve months and in any part of which a "manufacturing process" is being carried on with the aid of power or is ordinarily so carried on. Therefore, the emphasis in Section 2(m) of the Factories Act is on the manufacturing process. The manufacturing process has been defined in Section

2 (k) of the Factories Act which includes making, altering, repairing, ornamenting, finishing, packing, oiling, washing, etc. but does not even remotely suggest that construction of building is also a manufacturing process. Since the workers engaged in the construction were not engaged in the manufacturing process, therefore, such workers are not covered under the provisions of the Factories Act. Such workers were not even engaged by the appellant. They were not on the rolls of the appellant. They were paid wages through the contractor i.e. an independent and distinct contract than the industrial activity undertaken by the appellant in its factory.

10. Some construction work is contemplated to be covered by the definition of manufacturing process i.e. constructing, reconstructing, repairing, refitting, finishing or breaking up ships of vessels. Generally speaking, the construction of building is not a manufacturing process to which the Factories Act would be applicable.

11. The definition of building or other construction work as contained in Section 2 (d) of the Act excludes the provisions of the Factories Act if in respect of any building or any other construction work to which the provisions of Factories Act would apply. It means the Act will not be applicable in respect of "construction work" to which the provisions of the Factories Act are applicable. Therefore, the definition of building or other construction work as contained in Section 2 (d) of the Act clearly exclude such building and construction work to which the provisions of the Factories Act are applicable. Since the construction undertaken by the appellant was not undertaken by the employees of the appellant but by an independent contractor, therefore, the workers engaged in the construction work were not covered under the Factories Act and would be covered under Section 2 (d) of the Act.

12. In *Lanco Anpara's* case (supra) though no manufacturing process was commenced in the factory but the Act was made applicable to those workers who are engaged in the process of setting up of factory building wherein their work was to set up their factory. The workers who are engaged in the manufacturing process in a factory alone will be excluded from the operation of the Act whereas all workers engaged in the construction of civil work would be covered under the Act. Paras-25, 34, 35, 37, 38, 39 & 47 of the judgment in the case of *Lanco Anpara's* case (supra) are reproduced below:

25. We have bestowed our due and serious consideration to the submissions made of both sides, which these submissions deserve. The central issue is the meaning that is to be assigned to the language of Section 2(1)(d) of the Act, particularly that part which is exclusionary in nature i.e. which excludes such building and construction work to which the provisions of the Factories Act apply. Before coming to the grip of this central issue, we deem it appropriate to refer to the objectives with which the Factories Act and the BOCW Act were enacted, as that would be the guiding path to answer the core issue delineated above.

34. On the conjoint reading of the aforesaid provisions, it becomes clear that "factory" is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of "worker" under the Factories Act. On these two aspects, there is no cleavage and both parties are at ad idem. What follows is that these construction workers are not covered by the provisions of the Factories Act.

35. Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of the BOCW Act and the Welfare Cess Act as well. Could this be the intention while providing the definition of "building and other construction work" in Section 2(1) (d) of the BOCW Act? Clear answer to this has to be in the

negative.

37. We now advert to the core issue touching upon the construction of Section 2(1)(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(1)(d) of the BOCW Act dealing with the building or construction are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies". Thus, first part of the definition contains the nature of activity; second part contains the subject-matter in relation to which the activity is carried out and the third part excludes those building or other construction work to which the provisions of the Factories Act or the Mines Act apply.

38. It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work"as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words "but does not include any building or other"construction work *to which the provisions of the Factories Act....apply"*(emphasis supplied). The question is as to whether the provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply" only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with

the approach adopted by this Court in *Organo Chemical Industries v. Union of India.* Two separate, but concurring, opinion were given by Justice V.R. Krishna Iyer and Justice A.P. Sen, and we reproduce here below some excerpts from both opinions:

Justice A.P. Sen (SCC p.586, para 23)

"23.....Each work, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words *"devoid of concept or purpose"* will reduce much of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole."

(emphasis supplied)

Justice V.R.Krishna Iyer (SCC p.592, para 41)

"41. A policy oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to "damages" a larger, fulfilling meaning."

39. The aforesaid meaning attributed to the exclusion clause of the definition is also in consonance with the objective and purpose which is sought to be achieved by the enactment of the BOCW Act and the Welfare Cess Act. As pointed out above, if the construction of this provision as suggested by the appellants is accepted, the construction workers who are engaged in the construction of buildings/projects will neither get the benefit of the Factories Act nor of the BOCW Act/ Welfare Cess Act. That could not have been the intention of the legislature. The BOCW Act and the Welfare Cess Act are pieces of social security legislation to provide for certain benefits to the construction workers.

47. It is stated at the cost of repetition that construction workers are not covered by the Factories Act and, therefore,

welfare measures specifically provided for such workers under the BOCW Act and the Welfare Cess Act cannot be denied.

13. In view of the above, we do not find any error in the order passed by the learned Single Bench which warrants interference in the present appeals. The appeals stand dismissed. However, the appellant in Writ Appeal No.135/2017 is at liberty to approach the competent authority if there is any calculation mistake in the cess amount, who shall consider the same in accordance with law.

Appeal dismissed.

I.L.R. [2017] M.P., 798
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 14521/2012 (Jabalpur) decided on 29 February, 2016

MANOJ KUMAR NAGRE ...Petitioner
Vs.
THE COMMISSIONER OF M.P. & ors. ...Respondents

Hindu Adoptions and Maintenance Act (78 of 1956), Section 12 – Compassionate Appointment **– Whether an adopted son has a right of consideration for compassionate appointment – Held – Yes, 'Son' includes an 'adopted son' as per the provisions of the Act of 1956, so adopted son has a right of consideration for compassionate appointment – It is open to respondents to examine the validity of adoption – Respondents to take a final decision by a reasoned order within 90 days – Petition allowed. (Paras 6 to 12)**

हिन्दू दत्तक और भरण–पोषण अधिनियम, (1956 का 78), धारा 12 – अनुकम्पा नियुक्ति – क्या एक दत्तक पुत्र को अनुकम्पा नियुक्ति हेतु विचार किये जाने का अधिकार है – अभिनिर्धारित – हाँ, 1956 के अधिनियम के उपबंधों के अनुसार 'पुत्र' में 'दत्तक पुत्र' भी सम्मिलित है, इसलिए दत्तक पुत्र को अनुकम्पा नियुक्ति पर विचार किये जाने का अधिकार है – प्रत्यर्थीगण दत्तक ग्रहण की विधिमान्यता का परीक्षण करने हेतु स्वतंत्र है – प्रत्यर्थीगण 90 दिनों के भीतर सकारण आदेश द्वारा एक अंतिम निर्णय लें – याचिका मंजूर।

Case referred:

2009 (123) F.L.R. 127.

L.S. Singh with *J.L. Soni*, for the petitioner.
Sudeep Chaterjee, P.L. for the respondent/State.

ORDER

SUJOY PAUL , J. :- The core issue involved in this petition filed under Article 226 of the Constitution of India is whether an adopted son has a right of consideration for compassionate appointment.

2. The brief facts necessary for adjudication of the matter are that the petitioner is claiming himself as adopted son of the deceased-Government Employee Smt. Hemlata Nagre, who was working as Upper Division Clerk. The petitioner earlier preferred an application for grant of compassionate appointment. Since the said application was not decided, the petitioner filed W.P. No. 9726/08 before this Court which was disposed of on 29-08-2008 by directing the respondents to consider the case of the petitioner for compassionate appointment as per the policy/circulars applicable in the matter. In turn, the impugned rejection order dated 05-06-2010 is passed whereby it is held that the petitioner being an adopted son is not entitled for compassionate appointment in the teeth of policy dated 18-08-2008.

3. Shri L.S. Singh, learned Senior counsel for the petitioner criticized this order by contending that 'son' includes the adopted son. By placing reliance on subsequent policy dated 29-09-2014, it is urged that the respondents themselves realized that adopted son should also be considered. As per this policy it is clear that the adopted son is also entitled for consideration for compassionate appointment.

4. The prayer is opposed by Shri Sudeep Chaterjee, learned Panel Lawyer. He submits that as per the policy invogue i.e. 18-08-2008, the petitioner has no right of consideration.

5. No other point is pressed by learned counsel for the parties.

6. Before dealing with the rival contentions advanced by the parties, it is apt to quote relevant portion of Section 12 of the Hindu Adoption and Maintenance Act which reads as under:-

> "S.12 An adopted child shall be deemed to be the, child of his adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed

and replaced by those created by the adoption in the adoptive family. (Emphasis supplied)

7. The question whether 'son' includes the 'adopted son' came for consideration before a Division Bench of Calcutta High Court in 2009 (123) F.L.R. 127 *(District Primary School Council vs Sanjay Sarkar)*. The Calcutta High Court affirmed the order whereby a direction was issued to the employer to consider the case of claimant for appointment on compassionate ground. In the rule which was relied upon before the Calcutta High Court, the word son alone was mentioned and it was argued that the legislature in its wisdom has excluded the word 'adopted'. Thus, the word adopted cannot be included.

8. The Calcutta High Court after considering the provisions of said Act as well as General Clauses Act opined that the son includes an 'adopted son'.

9. In my view, although the subsequent circular issued by General Administration Department dated 29-09-2014 is not applicable in the present case, it at least shows that the Government later on decided to clarify that such adopted son/daughters, who have been legally adopted by Government Servant, are entitled for consideration. This gives an indication that government is willing to consider the case of adopted son/daughters.

10. I am in respectful agreement with the view taken by the Calcutta High Court in *Sanjay Sarkar* (supra). Resultantly, the impugned order dated 05-06-2010 is set aside. The petitioner is directed to resubmit his candidature/ application for grant of compassionate appointment with relevant documents to show that his adoption is legal/valid. In turn, the respondents shall consider the application for grant of compassionate appointment in accordance with law. It is made clear that it will be open to the respondents to examine the validity of adoption while considering the claim of the petitioner for grant of compassionate appointment. The respondents shall take a final decision by a reasoned order within 90 days. The outcome of such consideration be communicated to the petitioner.

11. It is made clear that this Court has not expressed any view on the merits of the case.

12. The petition is allowed to the extent indicated above. No cost.

Petition allowed.

I.L.R. [2017] M.P., 801
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 14445/2014(S) (Jabalpur) decided on 1 March, 2016

RAJESH PATEL ...Petitioner
Vs.
MP PKVV Co. Ltd. ...Respondent

Service Law – Fundamental Rules, M.P. – Rule 53 – Revision of Subsistence Allowance – **Pendency of criminal case – Claim for increase of subsistence allowance from 50% to 75% – Held – If the period of suspension is prolonged beyond three months and if the delay is not attributable to the Government Servant, the employer is under an obligation to consider the aspect of revision of subsistence allowance– Provision does not make any distinction between suspension because of D.E. and suspension because of any criminal case – Since there is no assertion about the aspect of delay in the revision application, liberty is given to the petitioner to make comprehensive representation and employer shall decide the same preferably within 30 days. (Paras 8, 9 & 12)**

सेवा विधि – मूलभूत नियम, म.प्र. – नियम 53 – निर्वाह भत्ते का पुनरीक्षण – दाण्डिक प्रकरण लंबित रहना – निर्वाह भत्ता 50% से बढ़ाकर 75% करने हेतु दावा – अभिनिर्धारित – यदि निलंबन की अवधि तीन माह से परे विलंबित की गई और यदि विलंब हेतु शासकीय सेवक जिम्मेदार नहीं, नियोक्ता, निर्वाह भत्ते के पुनरीक्षण के पहलू पर विचार करने के लिए बाध्यताधीन है – उपबंध, विभागीय जांच के कारण निलंबन तथा किसी दाण्डिक प्रकरण के कारण निलंबन के बीच कोई विभेद नहीं करता – चूंकि पुनरीक्षण आवेदन में विलंब के पहलू के बारे में प्राख्यान नहीं है, याची को विस्तृत अभ्यावेदन करने की स्वतंत्रता दी गई तथा नियोक्ता उक्त को प्राथमिकता से 30 दिनों के भीतर विनिश्चित करेगा।

Cases referred:

(2002) 1 SCC 193, (2003) 9 SCC 164, AIR 1968 SC 800, (2000) 10 SCC 201, AIR 1990 SC 1747, AIR 2009 SC 187, 1989 (1) SCC 546, 1993 Supp (2) SCC 210.

Amit Dubey, for the petitioner.
Sumit Kanojiya, for the respondent.

ORDER

SUJOY PAUL, J. :- The petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution to challenge the order dated 28.06.2014 (Annexure- P/5), whereby the respondents have declined the prayer of the petitioner to enhance/revise the subsistence allowance from 50% to 75%.

2. The petitioner while working as Deputy Director (Accounts) was placed under suspension by order dated 16.02.2013 (Annexure-P/2). The petitioner was placed under suspension because he remained in custody in relation to an offence in Crime No.121/2013 arising out of Sections 498-A, 195-A, 384 and 386 of IPC read with Sections 66 E, 67 and 67-A of the IT Act.

3. The case of the petitioner is that the petitioner was placed under suspension because of pendency of the criminal case. No disciplinary proceedings is instituted against him. The criminal case is proceeding with the speed of a snail. The petitioner preferred a representation on 05.10.2013 for revision of subsistence allowance from 50% to 75%. The representation Annexure-P/4 is rejected by the impugned order dated 28.06.2014 (Annexure-P/5).

4. Shri Amit Dubey, learned counsel for the petitioner by placing reliance on FR-53 contends that if the proceedings are continued beyond three months, and such delay is not attributable to the employee, the respondents are bound to enhance the subsistence allowance. He submits that delay caused in the said criminal case is not because of any fault of the petitioner and, therefore, he cannot be deprived from the right of revision of subsistence allowance. He further submits that the impugned order Annexure-P/5 is a non-speaking order and in absence of reasons, this order cannot be permitted to stand. In support of his contention, learned counsel for the petitioner has relied on the judgments of *B.D. Shetty and others Vs. Ceat Ltd. and another,* (2002) 1 SCC 193, *Pradip Kumar Mitra Vs. State of West Bengal and others,* 26th February, 2003, *Amit Biswas Vs. State of W.B. and others,* 14th February, 2007, *Pankajbhai Natwarlal Oza Vs. Indian Oil Corporation Ltd. Gujarat Refinery,* Letters Patent Appeal No.1013 of 2012, *Virendra Singh Yadav Vs. C.M.D., M.P. Madhya Kshetra Vidyut Vitran Co. Ltd. & others,* W.P. No.06/2011, *Union of India and others Vs. Devi Krishan Sharma,* W.P.(C)2449/2014.

5. Shri Sumit Kanojiya, learned counsel for the employer supported the order. He submits that in case of departmental inquiry, if delinquent employee is co-operating with the inquiry and the employer is delaying the proceedings, the employer can be blamed. In such a situation, the revision/enhancement in subsistence allowance can be prayed for. However, he submits that the case where employee is placed under suspension because of pendency of criminal case, is different. The criminal case is always between the delinquent employee and the State/Prosecution. The department has no role to play in that case. Hence, if the prosecution is delaying the proceedings, the employer cannot be saddled with enhancement of subsistence allowance. He relied on (2003) 9 SCC 164 *(Principal, J.D. Patil Sangludkar and another Vs. Ganesh).* No other point is pressed by learned counsel for the parties.

6. I have heard the parties at length.

7. In AIR 1968 SC 800 *(Balvantray Ratilal Patil Vs. State of Maharashtra)* and in (2000) 10 SCC 201 *Ram Lakhan Vs. Presiding Officer,* the Supreme Court held that what amount should be paid to an employee during the suspension will depend upon the provision of the statute or statutory rule applicable. Admittedly, in the present case, the aspect of subsistence allowance is governed by FR 53 which reads as under:

> **"F.R.53.** (1) A Government servant under suspension [or deemed to have been placed under suspension by an order of the appointing authority] shall be entitled to the following payments, namely:-
>
> i. xxx xxx xxx
>
> ii. in the case of any other Government servant:-
>
> (a) a subsistence allowance at an amount equal to the leave salary which the Government servant would have drawn if he had been on leave on half average pay or on half pay and in addition, dearness allowance, if admissible on such leave salary:
>
> Provided that where the period of suspension exceeds [three] months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first [three] months as follows:-

(i) the amount of subsistence allowance may be increased by a suitable amount; not exceeding 50% of the subsistence allowance admissible during the period of the first [three] months, if in the opinion of the said authority, the period of suspension has been prolonged for reasons to be recorded in writing not directly attributable to the Government servant;

(ii) the amount of subsistence allowance may be reduced by a suitable amount not exceeding 50% of the subsistence allowance admissible during the period of the first [three] months, if, in the opinion of the said authority, the period of suspension has been prolonged due to reasons to be recorded in writing, directly attributable to the Government servant;

[Emphasis supplied]

(iii) xxx xxx xxx

(b) xxx xxx xxx"

8. The highlighted portion shows that if the period of suspension is prolonged for the reason not directly attributable to the Government servant, subsistence allowance may be increased. The said provision does not make any distinction between suspension because of departmental inquiry and suspension because of any criminal case. Thus, what has not been prescribed in the statute is not required to be injected in the same. This is settled legal position that the intention of the Legislature is primarily to be gathered from the language used, which means the attention should be paid to what has been said as also to what has not been said [See: *Principles of Statutory Interpretation by Justice G.P. Singh* 12th Edition 2010 Page 64]. The same view is taken by the Supreme Court in AIR 1990 SC 1747 *(Gwalior Rayon Silk Manufacturing Co. Ltd. Vs. Custodial of Vested Forests),* and AIR 2009 SC 187 *(Nagar Palika Nigam Vs. Krishi Upaj Mandi Samit).* Hence, I am unable to hold that the parameters for enhancing the subsistence allowance should be different in cases of suspension based on pendency of disciplinary proceedings and suspension arising out of a criminal case. I find support in my view from the judgment of the Supreme Court reported in 1989 (1) SCC 546 *(P.L. Shah Vs. Union of India and another).* The Apex Court held that the

subsistence allowance is paid by the employer so that the employee against whom an order of suspension is passed on account of the pendency of any disciplinary proceeding or a criminal case instituted against him could maintain himself and his dependents until the departmental proceeding or the criminal case, as the case may be, comes to an end and appropriate orders are passed against the Government servant by the Government regarding his right to continue in service etc. It is further held that the very nomenclature of the allowance makes it clear that the amount paid to such a Government servant should be sufficient for bare subsistence in this world in which the prices of the necessaries of life are increasing every day on account of the conditions of inflation obtaining in the country. It is further to be noted that a Government servant cannot engage himself in any other activity/employment during the period of suspension. In *P.L. Shah* (supra) their Lordships held that the amount of subsistence allowance payable to the employee concerned should, therefore, be reviewed from time to time where the proceedings drag on for a long time, even though there may be no express rule insisting on such review of subsistence allowance, such revision is must. The Apex Court further opined that while examining the aspect of revision of subsistence allowance, the authority concerned no doubt has to take into account whether the Government servant is in any way responsible for undue delay in the disposal of the proceedings initiated against him. If the Government servant is not responsible for such delay, or even if he is responsible for such delay to some extent, but is not primarily responsible for it, it is for the Government to reconsider whether the subsistence allowance should be varied or not.

9. In the light of this judgment, it is clear that whenever delay takes place on account of departmental inquiry or criminal case, as the case may be, the employer is under an obligation to consider the aspect of revision of subsistence allowance. Thus, I am unable to accept the contention of Shri Kanojiya that FR 53 cannot be pressed into service in cases where suspension is on account of pendency of the criminal case. Reliance is placed on the judgment of Supreme Court in *Ganesh* (supra). In my view, the said judgment has no application in the present case. In the said case, FR 53 was not applicable. The Apex Court did not consider its earlier judgment rendered in the case of *P.L. Shah* (supra). A minute reading of Para 5 of the judgment shows that in that case the service rule did not permit for enhancement of subsistence allowance whereas in the present case, the service rule not only permits but it mandates that there must be a consideration about revision of subsistence

allowance when suspension continues beyond the period of three months. Hence, the said judgment is of no assistance to the employer.

10. In *Umesh Chandra Mishra Vs. Union of India and others*, 1993 Supp (2) SCC 210, the Apex Court considered Rule 2043 of the Indian Railway Establishment Code, which is almost *pari materia* to FR 53. The Apex Court in the said case directed for enhancement of subsistence allowance. In *B.D. Shetty* (supra), the Apex Court considered Section 10(1)A of the Industrial Employment (Standard Orders) Act, 1946 which talks about payment of subsistence allowance. In my view, the said statute is confined to the cases of disciplinary proceedings whereas as noticed FR 53 does not confine its operation to cases of suspension relating to disciplinary proceedings only. However, in *B.D. Shetty* (supra), the Apex Court opined that the enhancement of subsistence allowance cannot be denied after expiry of 90 days of suspension, if the delay in completion of disciplinary proceeding is not directly attributable to the conduct of such workman. The Delhi High Court in *Devi Krishna Sharma* (supra) has followed the ratio of *B.D. Shetty*. The judgments of *Amit Biswas* and *Pradeep Kumar Mitra* are based on different facts and circumstances and have no application in the factual matrix of the present case.

11. As analyzed above, the employer is bound to consider the aspect of the revision of subsistence allowance after 90 days of suspension. This is obligatory in the cases of suspension based on departmental inquiry and criminal case both.

12. In view of the aforesaid discussion, the ancillary question is whether the present petitioner is entitled for any relief. The petitioner's application (Annexure-P/4) dated 05.10.2013 shows that he has made a request for enhancement of subsistence allowance because he remained under suspension for more than six months. However, there is no assertion in this application about the aspect of delay which is being caused in the criminal case. Putting it differently, the petitioner has not averred in his application Annexure-P/4 that delay in criminal case is solely attributable to the prosecution or it is not attributable to him. The employer although rejected his application by non-speaking order, the said order cannot be interfered with because it was the primary duty of the petitioner to state that the delay caused in criminal case is not attributable to him. In absence of any such assertion, no fault can be found in the rejection order (Annexure-P/5). Needless to mention that the employer

is not a party in the criminal case. Hence the employer is not supposed to know about the reasons of delay in the criminal case. In the fitness of things, the employee should state the reasons for delay in criminal case with accuracy and precision. Thereafter, it is for the employer to examine the said aspect on the anvil of FR 53.

13. In the aforesaid backdrop, I am unable to set aside the order dated 28.06.2014. I am deem it proper to give liberty to the petitioner to file a comprehensive representation with copies of the proceedings of the criminal Court to show that the delay is not attributable to him. If such application is preferred by the petitioner before the employer, it shall be the duty of the employer to examine that application as per FR 53. The employer shall decide such application expeditiously preferably within 30 days by keeping in view the observations given hereinabove.

14. The petition is disposed of. No cost.

Order accordingly.

I.L.R. [2017] M.P., 807
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 3900/2016 (Jabalpur) decided on 2 March, 2016

UMESH SHUKLA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9(1) – **Held – As per Rule 9(1), an employee can be placed under suspension (a) where a disciplinary proceeding against him is contemplated or is pending, or (b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial. (Para 6)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1) – अभिनिर्धारित – नियम 9(1) के अनुसार, किसी कर्मचारी को निलंबन में रखा जा सकता है (ए) जहां उसके विरूद्ध अनुशासनिक कार्यवाही विचाराधीन या लंबित हो अथवा (बी) जहां उसके विरूद्ध किसी दाण्डिक अपराध के संबंध में प्रकरण, अन्वेषण, जांच या विचारण के अधीन हो।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9(1)(a) & 9(5)(a), (2-a) (2-b) – Disciplinary Enquiry and Criminal Investigation/Enquiry – **Automatic revocation of suspension order, if charge-sheet not filed within 90 days – Held – Conjoint reading of these rules, makes it clear that question of automatic revocation of suspension would arise when employee is placed under suspension because of disciplinary proceeding as per Rule 9(1)(a) of the Rules but in the present case, petitioner was not suspended because of any disciplinary proceeding, but was suspended because an investigation for a criminal offence was going on – In such circumstances, there is no provision in the Rules that suspension would automatically revoked after 90 days – Further held – Despite pendency of a criminal investigation/enquiry, the employer may initiate a disciplinary proceeding against the employee – In the present case, there is nothing to show that order has been passed under the dictate of Lokayukt rather the same has been passed with proper application of mind and necessary ingredients for placing the petitioner under suspension is taken into account – Petition dismissed. (Para 10)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1)(ए) व 9(5)(ए), (2–ए)(2–बी) – अनुशासनिक जांच एवं दाण्डिक अन्वेषण जांच – निलंबन आदेश की स्वतः वापसी, यदि आरोपपत्र को 90 दिनों के भीतर प्रस्तुत नहीं किया जाता – अभिनिर्धारित – इन नियमों को एक साथ पढ़े जाने पर यह स्पष्ट है कि निलंबन आदेश की स्वतः वापसी का प्रश्न तब उत्पन्न होगा जब कर्मचारी को नियमों के नियम 9(1)(ए) के अनुसार अनुशासनिक कार्यवाही के कारण निलंबन में रखा गया है परंतु वर्तमान प्रकरण में, याची को किसी अनुशासनिक कार्यवाही के कारण निलंबित नहीं किया गया था बल्कि इसलिए निलंबित किया गया था क्योंकि एक दाण्डिक प्रकरण हेतु अन्वेषण चल रहा था – उक्त परिस्थितियों में, नियमों में कोई उपबंध नहीं कि 90 दिनों के पश्चात् निलंबन स्वतः वापस होगा – आगे अभिनिर्धारित – दाण्डिक अन्वेषण/जांच लंबित रहने के बावजूद, नियोक्ता कर्मचारी के विरूद्ध अनुशासनिक कार्यवाही आरंभ कर सकता है – वर्तमान प्रकरण में, यह दर्शाने के लिए कुछ नहीं कि लोकायुक्त के कहने पर आदेश पारित किया गया है, बल्कि उसे मस्तिष्क के उचित प्रयोग के साथ पारित किया गया है और याची को निलंबन में रखने के आवश्यक घटकों को विचार में लिया गया है – याचिका खारिज।

Cases referred:

2005 (4) MPLJ 524, 2012 (3) MPLJ 567.

Dileep Pandey, for the petitioner.
Sudeep Chaterjee, for the respondent/State.

ORDER

SUJOY PAUL, J. :- In this petition filed under Article 226 of the Constitution of India, the petitioner has challenged the suspension order dated 18-05-2015 (Annexure P/1).

2. Learned counsel for the petitioner submits that the suspension order dated 18-05-2015 is liable to be set aside on two counts. Firstly, it is contended that this order is passed on the dictate of Lokayukta. There is no independent application of mind by the Superintendent of Police. Secondly, it is contended that the Charge-sheet in the Departmental Enquiry was issued after 90 days from the date of suspension, hence the suspension stood revoked.

3. The prayer is opposed by Shri Sudeep Chaterjee, learned Panel Lawyer.

4. I have heard the parties at length.

5. The impugned order, on the face of it, shows that the petitioner was placed under suspension because a criminal case relating to demand of bribe is under investigation by Lokayukta Establishment. The first question is whether the Authority can place the petitioner under suspension for this reason?

6. Learned counsel for the petitioner during the course of arguments fairly admits that Rule 9(1) of the M.P.C.S. (C.C.A.) Rules, 1966 is the enabling provision. Rule 9 (1) of the C.C.A. Rules makes it crystal clear that an enmployee can be placed under suspension- (a) where a disciplinary proceeding against him is contemplated or is pending, or (b) where a case against him in respect of any criminal offence is under investigation, inquiry of trial.

7. The provision makes it clear that an employee can be placed under suspension even when an investigation is going on in respect of criminal offence. Thus, I am unable to hold that the Superintendent of Police was either incompetent or there was no provision to place the petitioner under suspension. If Rule 9 of the C.C.A. Rules or the enabling provision is not quoted in the impugned order, this will not make the order vulnerable. The order nowhere shows that it has been passed without application of mind or on the dictate of Lokayukta Organization. Order on the contrary shows that necessary

ingredient for placing the petitioner under suspension is taken into account. Thus, the contention in this regard is rejected.

8. The second contention is regarding revocation of suspension because the Charge-sheet is issued after 90 days. For this submission, Shri Dileep Pandey relied on Rule 9 (5) (a) of C.C.A. Rules. The said Rules reads as under :-

> "(5)(a) An order of suspension made or deemed to have been made under this rule, shall continue to remain in force until it is modified or revoked by the authority competent to do so :
>
> [Provided that the order of suspension shall stand revoked on expiry of the period of forty-five -days from the date of order of suspension in case a copy of charges and other documents referred to in sub-rule (2-a) are not issued to such Government without obtaining the orders of the State Government for extension of the period for issue of the said documents as required under sub-rule (2-b):
>
> Provided further that the order of suspension shall stand revoked on expiry of the period of 90 days from the date of order of suspension, in case the copy of charges and other documents referred to in sub-rule (2-a) are not issued to such Government servant]"

9. This Sub-rule 5 (a) talks about Sub-rule (2-a) & (2-b) which read as under:

> "(2-a) Where a Government servant is placed under suspension under clause (a) of sub-rule (1), the order of suspension shall contain the reasons for making such order and where it is proposed to hold an enquiry against such Governemnt servant under rule 14, a copy of the articles of charges, the statement of imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained shall be issued or caused to be issued by the disciplinary authority to such Government servant as required by sub-rule (4) of Rule 14, within a period of 45 days from the date of order of suspension:

Provided that where the disciplinary authority is the [State Government or the High Court], the copy of charges and other documents mentioned above shall be issued or caused to be issued to such Government servant within a period of 90 days from the date of order of suspension.]

(2-b) Where the disciplinary authority fails to issue to the Government servant, a copy of the charges and other documents referred to in sub-rule (2-a) within the period of 45 days, the disciplinary authority shall, before expiry of the said period, obtain orders in writing of the State Government for extension of the said period of suspension:

Provided that the period of suspension shall in no case be enhanced beyond a period of 90 days from the date of the order of suspension."

10. A Conjoint reading of Clause (a) of Sub-rule (1) of Rule 9 and Sub-rule 5 (a) (2-a) and (2-b) of the said Rules makes it clear that the question of automatic revocation of suspension would arise when the employee is placed under suspension because of pendency of disciplinary proceeding as per Rule 9 (1)(a) of C.C.A.Rules. In the present case, the impugned order of suspension makes it clear that the petitioner was not suspended because of any disciplinary proceeding. He was suspended because an investigation for a criminal offence is going on. Thus, Sub-rule 5(a) of the said Rules cannot be pressed into service in the present case. Hence, when an employee is placed under suspension because of investigation in criminal case, there is no provision in the Rules that the suspension would be automatically revoked after 90 days. In other words, it is prerogative of the employer to proceed simultaneously against an employee in a Departmental Enquiry. Putting it differently, despite pendency of a criminal investigation/enquiry, the employer may initiate a disciplinary proceeding. In that event, the employer may decide to issue Charge-sheet after sometime. The said Charge-sheet, if issued after 90 days, will not have an impact of automatic revocation of suspension because the suspension order was not passed because of pendency of any disciplinary proceeding. Thus, the second contention of Shri Dileep Pandey cannot be accepted.

11. Shri Dileep Pandey relied on 2005(4) MPLJ 524 *(Suresh Kumar Purohit vs State of M.P. and another)*. The said judgment relates with the

aspect of independent application of mind. At the cost of repetition in my opinion there is no material on record to show that the competent authority has placed the petitioner under suspension without application of mind. There is no iota of evidence to show that competent authority has acted under dictate of Lokayukta Organization. Hence in the fact situation of the present case, the said judgment is of no assistance. Apart from this, a Division Bench of this Court in 2012 (3) MPLJ 567 *(A.P. Singh Gaharwar vs. State of M.P. and others)* considered the aforesaid judgment. The Division Bench opined as under :-

> "23. We are, therefore, constrained to clarify that the decision rendered in the case of *Suresh Kumar Purohit* (supra) was and is confined to the facts of that particular case and cannot and shall not be treated as laying down the law or as a precedent for the purposes of interpreting the provisions of Rule 9 of the Rules of 1966, in any other case specifically in view of the analysis and interpretation of Rule 9 (1) and 9 (5)(d) of the Rules of 1966, as made by us in the present case."
>
> (Emphasis supplied)

12. On the basis of the aforesaid analysis, I find no reason to interfere in this petition. Hence, the petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2017] M.P., 812
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 14519/2012 (Jabalpur) order passed on 11 July, 2016

CENTRAL BANK OF INDIA ...Petitioner
Vs.
SHRI DINESH KUMAR KAHAR ...Respondent

***Industrial Disputes Act (14 of 1947), Section 17-B* – Payment of full wages to workman during pendency of proceedings before High Court or Supreme Court – Facts – Central Government Industrial Tribunal cum-Labour Court directing for reinstatement of respondent/ workman with back wages from date of termination – Petition against – Operation of award was stayed subject to compliance of provisions u/S 17-B of Industrial Disputes Act, 1947 – Petitioner bank depositing**

entire back wages of Rs. 3,82,554/- – Application by petitioner bank seeking direction for refund of the amount paid towards back wages – Grounds – Provisions u/S 17-B of Industrial Disputes Act, 1947 has been misconstrued – Held – Section 17-B of Industrial Disputes Act, 1947 makes specific provisions that with the institution of proceedings in the High Court or Supreme Court by the employer it entails the liability to pay wages last drawn by the workman subject to the condition that workman is not gainfully employed and an affidavit to that effect is filed - In this case the employer has deposited entire back wages but Section 17-B of Industrial Disputes Act, 1947 creates no bar for whole or partial compliance of the award – No direction for refund can be given nor direction for adjusting the amount towards last wages drawn to be paid during pendency of petition can be given – Petitioner can recover the said amount by taking recourse to law if it succeeds in the petition – I.A. disposed of. (Paras 5 to 7)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 17–बी – उच्च न्यायालय या उच्चतम न्यायालय के समक्ष कार्यवाही लंबित रहने के दौरान कर्मकार को पूर्ण मजदूरी का संदाय – तथ्य – केंद्र सरकार औद्योगिक अधिकरण–सह–श्रम न्यायालय ने प्रत्यर्थी/कर्मकार को सेवा समाप्ति की तिथि से पिछली मजदूरी के साथ बहाल करने हेतु निदेशित किया – के विरूद्ध याचिका – औद्योगिक विवाद अधिनियम, 1947 की धारा 17–बी के अंतर्गत उपबंधों के अनुपालन के अधीन अवार्ड का प्रवर्तन रोका गया था – याची बैंक द्वारा रू. 3,82,554/– की संपूर्ण पिछली मजदूरी का जमा किया जाना – याची बैंक द्वारा पिछली मजदूरी की ओर संदाय की गई राशि का प्रतिदाय करने हेतु निदेश चाहने के लिए आवेदन – आधार – औद्योगिक विवाद अधिनियम, 1947 की धारा 17–बी के अंतर्गत उपबंधों का गलत अर्थ निकाला गया है – अभिनिर्धारित – औद्योगिक विवाद अधिनियम, 1947 की धारा 17–बी विनिर्दिष्ट उपबंध बनाती है कि नियोक्ता द्वारा उच्च न्यायालय या उच्चतम न्यायालय में कार्यवाही संस्थित होने के साथ ही वह कर्मकार द्वारा अंतिम बार प्राप्त मजदूरी का संदाय करने का दायित्व उत्पन्न करती है, इस शर्त के अधीन कि कर्मकार लाभकारी रूप से नियुक्त नहीं है तथा उस प्रभाव का एक शपथपत्र प्रस्तुत किया गया है – इस प्रकरण में नियोक्ता ने संपूर्ण पिछली मजदूरी जमा की है परंतु औद्योगिक विवाद अधिनियम, 1947 की धारा 17–बी, अवार्ड के संपूर्ण या आंशिक अनुपालन हेतु कोई वर्जन सृजित नहीं करती – प्रतिदाय हेतु कोई निदेश नहीं दिया जा सकता और याचिका लंबित रहने के दौरान संदाय किये जाने हेतु प्राप्त की गई अंतिम मजदूरी की राशि समायोजित करने का निदेश नहीं दिया जा सकता – याची विधि का अवलंब लेते हुए उक्त राशि वसूल कर सकता है यदि वह याचिका में सफल होता है – अंतर्वर्ती आवेदन निराकृत।

S.K. Rao with *S. Chaturvedi,* for the petitioner.

S.K. Gupta, for the respondent.

(Supplied : Paragraph numbers)

ORDER

SANJAY YADAV, J. :- I.A. No.768/2014 filed by the petitioner are taken up for consideration. Vide this application, petitioner seeks direction to respondent-workman to deposit the amount paid towards backwages.

2. Petition is directed against an Award passed on 4.5.2012 by the Central Government Industrial Tribunal-cum-Labour Court, Jabalpur, directing reinstatement of the respondent-workman with backwages from the date of termination. The operation of impugned Award was stayed on 5.9.2012 subject to compliance of provisions under Section 17B of the Industrial Disputes Act, 1947 (for short '1947 Act'). The petitioner despite the said order paid an amount of Rs.3,82,554/- being the backwages vide Cheque No.ENG/G No.0357826 dated 24.4.2013 in compliance of Section 17B of 1947 Act. It is the refund of this amount which is being sought vide present application on the submissions that instead of paying the wages last drawn by the workman, entire backwages has been paid by misconstruing the provisions of Section 17B of 1947 Act and a wrong advice given by the counsel conducting the case.

3. Respondent-workman has opposed the application.

4. Considered rival submissions.

5. Question is whether the provisions contained under Section 17B of 1947 Act prohibits the employer from part compliance of the Award. And, with the part compliance, the workman if still is unemployed, can the employer abdicate from paying the last wages drawn.

Section 17B of 1947 Act mandates :

> **"17B. Payment of full wages to workman pending proceedings in higher Courts.-** Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive

of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be."

6. Fair reading of the provisions makes it ample clear that merely with the institution of proceedings in the High Court or the Supreme Court, as the case may be, by the employer, entails the liability to pay wages last drawn by the workman, in case other conditions mentioned therein are meted out i.e. the workman is not gainfully employed and an affidavit to that effect is filed.

7. The provisions of Section 17B of 1947 Act creates no bar for whole or partial compliance of the Award. In case the Award is of reinstatement with backwages, the employer can reinstate the workman and seek stay of money part. In that event, if the workman is reinstated, he will be entitled for current wages. In case where the employer tenders the entire backwages, as in the present case, he will be liable to pay the wages last drawn subject to fulfillment of other conditions therein. Thus, there being no statutory bar of partial compliance of the Award, no direction can be given to the respondent to refund entire amount paid towards backwages, nor can there be direction to adjust the amount towards last wages drawn to be paid during pendency of writ petition. The petitioner, in case if he succeeds in the petition, would be at liberty to recover the amount by taking recourse to law.

8. I.A. No.768/2014 is disposed of finally in above terms.

9. In view of this order, no order is warranted on I.A. No.525/2015.

10. List the matter for final hearing under the caption 'High Court Expedited Cases'.

11. Record of CGIT-cum-Labour Court be requisitioned.

Order accordingly.

I.L.R. [2017] M.P., 816
WRIT PETITION
Before Mr. Justice Vivek Rusia
W.P. No. 2697/2015 (Indore) decided on 22 August, 2016

SHREE MAHESHWARI SAMAJ RAMOLA TRUST THROUGH PRESIDENT & TRUSTEES ...Petitioner
Vs.
REGISTRAR OF PUBLIC TRUST AND SUB-DIVISIONAL OFFICER RATLAM (M.P.) & ors. ...Respondents

Public Trusts Act, M.P. (30 of 1951), Section 26 – Powers of Registrar **– Petition filed against passing of interim injunction by the Registrar restraining the President of Trust to conduct meetings, operating bank account and to pass regulation regarding movable & immovable properties till fresh elections – Held – U/S 26, Registrar, only on application or *Suo Motu* can direct the trustee or himself make an application to Court to decide the issue regarding administration of public trust – Power of adjudication not granted to Registrar under this Section – Neither u/S 26 nor any other Section gives power of injunction to Registrar – Even inherent power has not been granted – Power to issue direction on such issue is only granted to the Court u/S 27(2)(F) of the Act. (Para 15 & 17)**

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 26 – रजिस्ट्रार की शक्तियां – रजिस्ट्रार द्वारा न्यास के अध्यक्ष को नया निर्वाचन होने तक बैठक संचालित करने, बैंक खाता चलाने एवं चल तथा अचल संपत्तियों के संबंध में विनियमन पारित करने से अवरूद्ध करते हुए पारित किये गये अंतरिम व्यादेश के विरूद्ध याचिका प्रस्तुत की गई – अभिनिर्धारित – धारा 26 के अंतर्गत, रजिस्ट्रार, केवल आवेदन पर अथवा स्वयं से लोक न्यास के प्रशासन से संबंधित विवाद्यक का विनिश्चय करने के लिए न्यासी को निदेश दे सकता है अथवा न्यायालय के समक्ष स्वयं आवेदन कर सकता है – इस धारा के अंतर्गत, रजिस्ट्रार को न्यायनिर्णयन की शक्ति प्रदत्त नहीं – न तो धारा 26 न ही कोई अन्य धारा रजिस्ट्रार को व्यादेश की शक्ति देती है – यहां तक कि अंतर्निहित शक्ति भी प्रदान नहीं की गई है – उक्त विवाद्यक पर निदेश जारी करने की शक्ति, अधिनियम की धारा 27(2)(एफ) के अंतर्गत केवल न्यायालय को प्रदान की गई है।

Cases referred:

1969 MPLJ 680, (2011) 9 SCC 541, 1996 (1) SCC 590, (1994) 4 SCC 225.

A.K. Chitle with *Vishal Lashkari,* for the petitioner.
Yogesh Mittal, G.A. for the respondent No. 1.
Tarun Kushwaha, for the respondent Nos. 2 to 4.

ORDER

VIVEK RUSIA, J. :- The petitioner is a registered public trust under the M.P. Public Trust, 1951. Petitioner no. 1 is the President of the Trust and petitioner nos. 2 to 13 are the present trustees and they have authorized petitioner no. 1 to file this present petition.

2. According to the petitioner, Shri Maheshwari Samaj Ramola Trust was formed by trust deed dated 28/12/1958. Later on, it was registered as Public Trust in the year 1972 by the Registrar of the Public Trust and the Collector, Ratlam. Vide order dated 16/06/1997, the Registrar had appointed ten new trustees under section 9 of the M.P. Public Trust Act, 1951(hereinafter referred to as "the Act, 1951"). In the year 1914, six new trustees were appointed and an information to the said effect was given to the Registrar. Thereafter, two more trustees were appointed and an information to that effect was sent. According to the petitioner, the trust is working properly since 1958 under the provisions of law.

3. That, respondent nos. 2 to 4 filed an application under section 26 of the Act, 1951 on 31/07/2014 before the Registrar, Public Trust - cum - SDO, Ratlam. The said application was registered as case no. 01/B-113(4)/13-14 and notices were issued to the petitioner / Trust for appearance. In pursuance to the notice, the petitioner / Trust appeared through their counsel and thereafter, a detailed reply was also filed denying the allegations made in the application.

4. That on 27/08/2014, the respondent filed an application seeking interim direction before the Registrar. According to the petitioners, a copy of the said application was not supplied to them. Vide order dated 27/08/2014, the Registrar has passed injunction order. Being aggrieved by the order dated 27/08/2014, Writ Petition no. 6927/2014 was filed before this Court, in which, stay was granted. Later on , this Court has set aside the order dated 27/08/2014 by remanding that to the Registrar with a direction to pass afresh order in light of the judgment delivered in the case of *Umedi Bhai and others Vs. Collector of Sihor and others* reported in 1969 MPLJ 680.

5. After the remand order, the petitioners appeared before the Registrar

by filing a reply to the interim injunction. After hearing both the parties, the Registrar, Public Trust, again passed interim injunction vide order dated 13/04/2015. Vide interim order dated 13/04/2015, the Registrar has also observed that tenure of the President and other trustees have been over and as per the order dated 01/01/1973, the elections are required to be held, therefore, the Registrar has restrained the President not to conduct any meetings and not operate bank account and further not to pass any regulation in respect of movable and immovable properties.

6. Being aggrieved by the aforesaid order dated 13/04/2015, the present petition has been filed before this Court.

7. Shri A.K. Chitlale, learned Sr counsel submits that learned Registrar has travelled beyond his jurisdiction and passed the order contrary to the provisions of the Act, 1951. He has no power to pass the interim order under the Act, 1951. The only power, which is available to the Registrar, is to record his satisfaction and refer the dispute to the Civil Court for adjudication, therefore, the impugned order is bad in law and liable to be set aside by this Court.

8. Respondent no. 1 has filed return in support of the order of the Registrar and submitted that this is only an interim order, which cannot be challenged by the petitioner in writ petition. Final order is yet to be passed by the Registrar under the provisions of Section 26 of the Act, 1951.

9. Respondent no. 2 to 4 have also filed a reply raising preliminary objections submitting that under the trust deed as well as the order dated 01/01/1972, the tenure of the President and other trustees are over and they are deliberately not conducting the election. It is further submitted that the Registrar has not passed the order under sections 26 and 27 of the Act, 1951. That, final order is yet to be passed by the Registrar. That, the Registrar is competent to pass interim order as the provisions of the CPC are applicable. The Registrar is competent to refer the dispute, if final order under section 26 of the Act is passed. Before passing final order, the Registrar may pass interim order, if occasion so arise, for which, he is not required to refer the dispute to the Civil Court.

10. Shri Yogesh Mittal, learned GA and Shri Tarun Kushwah, learned counsel for respondent nos. 2 to 4 have argued that the Registrar has not committed any illegality in passing the impugned order. He has considered the working of the Trust and the trustees and found that despite the order dated

01/01/1972, they are not conducting any election despite, three years' tenure have expired long back. Since their period has been expired to hold the post of President and trustees, therefore, they have rightly been restrained to operate the trust account and took decision about the movable and immovable properties, hence the impugned order is not liable to be interfered in this writ petition.

11. I have heard the learned counsel for the parties.

ORDER

12. That, the M.P. Public Trust Act, 1951 is an Act to regulate and make appropriate provisions for administration of public, religious and charitable trust in Madhya Pradesh.

13. Under section 3 of the Act, 1951. the Collector shall be the Registrar of Public Trust in respect of every public trust and he shall maintain register for public trust. Power has been given to the Registrar under section 5 to conduct enquiry for registration on receipt of application. After completion of enquiry, he shall record his findings with reasons and they are final in nature. Any working trust or person having interest in the public trust or in any property, may challenge such order by way of civil suit. Thereafter, there are other provisions regarding working of the trust. The power of the Registrar is given under section 22 of the Act, 1951 and under section 23 of the Act, 1951, he can pass order in respect of the audit of the trust, which is again liable to be challenged by way of appeal under section 24 of the Act, 1951 before the Civil Court.

14. The power has also been given to the Registrar under section 26 of the Act, 1951 to inquire about the working of the trust, if original body of the trust has failed or the property is not being properly managed or administered and any direction is necessary for administration of public trust, either *suo-moto* or on an application and after giving opportunity to the working trustees during the said trust, to apply to the Court for directions within time specified. If the trustees fails to make an application or there is no trustee, then the Registrar himself can make an application to the Court. On receipt of such application, the Court shall make or cause to be make such enquiry under section 27 of the Act, 1951 and can pass the order as provided under sub-section 2 of section 27 of the Act, 1951. The powers, which has been given to the Registrar under the Act, 1951 are under sections 5, 6, 7, 9, 22, 23 of

the Act, 1951. Accordingly, he has to work under the said provisions. In the present case, the powers given to him under section 26 of the Act, 1951 is to be examined.

15. That, respondent nos. 2 to 4 have filed an application under sections 26 and 27 of the Act, 1951 alleging that the three years' tenure of the Trust is over and no election is being held despite the order dated 01/01/1972. The said application was filed alongwith an application for stay. On the basis that, the Registrar has registered a case vide order dated 31/07/2014 and issued notices to the petitioners. Initially, interim order was passed without hearing the petitioners. That was set aside by this Court, thereafter, remand impugned order dated 13/04/2015 was passed. This order was not passed under section 26 of the Act, 1951, but was passed in the nature of injunction order. The final order under section 26 of the Act, 1951 is yet to be passed by the Registrar. The question for consideration in this case is, whether the Registrar has power to grant injunction under the Act, 1951.

16. As discussed above, the limited powers were given to the Registrar under the Act, 1951, in which there is no power to grant temporary injunction. The application which was moved before the Registrar was under section 26 and 27 of the Act, 1951. Under section 26 of the Act, 1951, the Registrar, only on application or *suo-moto* can direct the trustee or himself make an application to the Court to decide the issue, whether the trust has failed to achieve his object or not being properly managed or administered or any direction is necessary for administration of the public trust. The Registrar is only required to record his satisfaction to that effect. Even power of adjudication has not been granted under section 26 of the Act, 1951. After summarary enquiry, he can refer his satisfaction and refer the dispute to the Civil Court.

17. Neither under section 26 of the Act, 1951 nor any other section, power of injunction has been granted to the Registrar. It is settled law that the power which is not conferred on it by the statute either by way of the Act or Rules, the same cannot be exercised, even inherent power has not been granted to the Registrar. The power, which has been granted to issue any direction as the nature of the case may require, is only granted to the Court under section 27(2)(f) of the Act, 1951.

18. In support of his contentions, Shri A.K. Chitale, learned Sr counsel has cited the judgment delivered in the case of *Umedi Bhai and others Vs.*

Collector of Sihor and others reported in 1969 MPLJ 680. in which, in para 4, it has been held that the Registrar has no inherent power to issue injunction as the Act, 1951 does not confer any power. Para- 4 is reproduced below:

> 4. With regard to the injunction order, we are of the opinion that the Registrar had no inherent power to issue an injunction against the decree holder to execute his decree. The proceedings under the Act before the Registrar are not judicial proceedings. The Act doe not confer any power upon the Registrar to issue injunctions to any person. The provisions of the Code of Civil Procedure have not been applied to the proceedings before the Registrar except to the extent provided under section 28 of the Act and these matters relate only to proof of affidavits, summoning and attendance of persons, compelling the production of documents and issue of commissions. This restricted application of the Code of Civil Procedure necessarily implies that the power to issue injunctions is not vested in the Registrar. The Registrar not being a Court, he cannot exercise inherent powers under section 151 of the Code of Civil Procedure or otherwise. We are therefore of opinion that the Registrar was not right in issuing the injunction under dated the 22nd March 1963 which was hereby quash.

19. Shri Tarun Kushwah, learned counsel for respondent nos. 2 to 4 submits that in the case of *Umedi Bhai and others* (supra), the decree granted by the Court was stayed by the Registrar, but in the present case, the facts are different where the trustees are working despite their tenure has been over, therefore, they were restrained by the Registrar not to operate bank account and hold meetings, therefore, the facts of the case of *Umedi Bhai and others* (supra) are different from the present case. That, in para 4 of the said judgment, the Division Bench has finally held that the proceedings under the Act, 1951 before the Registrar are not judicial proceedings and the Act, 1951 does not conferred any power upon the Registrar to issue injunction to any person. The Court has also held that, the provisions of the CPC have not been applied to the proceedings before the Registrar except to the extend provided under section 28 of the Act, 1951. Even otherwise, as per the powers given to the Registrar under section 26 of the Act, 1951, by which he cannot pass final order, he is required to refer only to the Civil Court, therefore, he

cannot pass even interim order.

20. In the present case, nature of the interim order, which has been passed by the Registrar even cannot be passed by way of final order under section 26 of the Act, 1951, therefore, the Authority or the Court which cannot pass final order of particular nature, cannot pass even interim order.

21. The Registrar, Public Trust is a creature of statute and derives power from the express provisions of the Act, 1951. The Registrar has not been given power to grant interim relief. Hence, the power which has not been given expressly by statute cannot be exercised. I find support from the judgment of Hon'ble Apex Court in the case of *Rajeev Hitendra pathak Vs. Achyut Kashinath Karekar* reported in (2011) 9 SCC 541; *Guljarilal Agrawal Vs. ACC* reported in 1996(1) SCC 590 as also in the case of *Morgan Stanley Mutual Fund Vs. Kartick Das* reported in (1994) 4 SCC 225, of which, para 43 and 44 are relevant, which are reproduced below:

> 5: What is the scope of Section 14 of the Act?
>
> 43. The said section reads as under:
>
> "(1) If, after the proceeding conducted under Section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to take one or more of the following things, namely:
>
> (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
>
> (b) to replace the goods with new goods of similar description which shall be free from any defect;
>
> (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
>
> (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.
> (2) Every order made by the District Forum under sub-section (1) shall be signed by all the members constituting it and, if

there is any difference of opinion, the order of the majority of the members constituting it shall be the order of the District Forum. (3) Subject to the foregoing provisions, the procedure relating to the conduct of the meetings of the District Forum, its sittings and other matters shall be such as may be prescribed by the State Government."

44. A careful reading of the above discloses that there is no power under the Act to grant any interim relief of (sic or) even an ad interim relief. Only a final relief could be granted. If the jurisdiction of the Forum to grant relief is confined to the four clauses+ mentioned under Section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience.

At the most, the Registrar could have directed the trust or the applicant to approach Civil Court for obtaining interim relief.

22. Therefore, in view of the above, the impugned order dated 13/04/2015 deserves to be set aside and is accordingly set aside. The Registrar, Public Trust, Ratlam is directed to pass an order under section 26 of the Act, 1951 within a period of 15 days from the date of production of certified copy of this order.

C c as per rules.

Order accordingly.

I.L.R. [2017] M.P., 823
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 3805/2015(S) (Indore) decided on 22 August, 2016

VINOD RATHORE ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 1811/2015(S), W.P. No. 1817/2015(S), W.P. No. 3808/2015(S) & W.P. No. 3817/2015(S))

Adhyapak Samvarg (Employment & Conditions of Services) Rules, M.P., 2008, Education Guarantee Scheme, M.P., 1997, Panchayat

***Samvida Shala Shikshak (Appointment and Conditions of Service) Rules, M.P. 2001 and Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Niyam, M.P., 2005* – Representation of the petitioner has been rejected and recovery ordered against him – Petitioner was appointed as Guruji in the year 2007 – He was appointed as Samvida Shala Shikshak Grade-III in year 2012 by an order dated 11.10.2012 and he was absorbed as Adhyapak on 25.06.2015 – Certainly he is not at all entitled for a regular pay scale right from the year 2007 – At the best he is entitled for a pay scale of Samvida Shala Shikshak Grade-III only w.e.f. 11.10.2012 and pay scale to the post of Adhyapak only w.e.f. 25.06.2015 – Order of recovery passed by the respondents does not warrant any interference – Petition dismissed. (Para 29)**

अध्यापक संवर्ग (रोजगार और सेवा की शर्तें) नियम, म.प्र., 2008, शिक्षा गारंटी योजना, म.प्र., 1997, पंचायत संविदा शाला शिक्षक (नियुक्ति और सेवा की शर्तें) नियम, म.प्र. 2001 एवं पंचायत संविदा शाला शिक्षक (रोजगार और संविदा की शर्तें) नियम, म.प्र. 2005 – याची का अभ्यावेदन अस्वीकार किया गया और उसके विरूद्ध वसूली आदेशित की गई – याची को वर्ष 2007 में गुरूजी नियुक्त किया गया था – उसे आदेश दिनांक 11.10.2012 द्वारा वर्ष 2012 में संविदा शाला शिक्षक श्रेणी–III के पद पर नियुक्त किया गया तथा 25.06.2015 को अध्यापक के रूप में आमेलित किया गया – निश्चित रूप से, वह सीधे वर्ष 2007 से नियमित वेतनमान का बिल्कुल भी हकदार नहीं – ज्यादा से ज्यादा वह मात्र 11.10.2012 से प्रभावी रूप से संविदा शाला शिक्षक श्रेणी–III के वेतनमान का और मात्र 25.06.2015 से प्रभावी रूप से अध्यापक के पद के वेतनमान का हकदार है – प्रत्यर्थीगण द्वारा पारित वसूली के आदेश में किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred:

2012 (2) MPLJ 605, Civil Appeal No. 3500/2006 decided on 29.06.2016 (Supreme Court).

Rahul Sethi, for the petitioner.
Sanjay Karanjwala, for the respondent/State.
Mini Ravindran, for the respondent No. 4.

ORDER

S.C. SHARMA, J. :- Regard being had to the similitude in the controversy involved in the present cases, the writ petitions were analogously heard and by a common order, they are being disposed of by this Court.

Facts of Writ Petition No.3805/2015 are narrated hereunder.

2. The petitioner before this Court is aggrieved by order dated 31/01/2015 passed by respondent No.4 Janpad Panchayat, Maheshwar by which the petitioner's representation has been rejected. The petitioner is also aggrieved by order dated 09/06/2015 passed by Principal, Govt. Hr. Sec. School, Bablali, Distt. Khargone by which a recovery has been ordered against the petitioner.

3. The petitioner's contention is that he was initially appointed on the post of Shiksha Karmi / Guruji on 02/06/1997. The petitioner has further stated that the State Government has conducted an examination for the post of Shiksha Karmi and the petitioner was appointed as Samvida Shala Shikshak Grade-III by an order dated 19/02/2013.

4. The petitioner's contention is that basic qualification for appointment on the post of Shiksha Karmi / Guruji / Samvida Shala Shikshak Grade-III and Sahayak Adhyapak is Higher Secondary and earlier persons were appointed on the post of Guruji / Shiksha Karmi and thereafter, they have been appointed on the post of Samvida Shala Shikshak Grade-I, II and III.

5. The petitioner has further stated that the State Government has framed the rules known as M. P. Adhyapak Samvarg (Employment & Conditions of Services) Rule, 2008 and by virtue of the aforesaid Rules persons who were holding the post of Samvida Shala Shikshak Grade-III were merged / appointed on the post of Sahayak Adhyapak. The education qualification provided under the Rules is Higher Secondary with a degree of B.T.C./D.Ed./ D.S.E.

6. The petitioner has further stated that since he was not granted benefit of Shiksha Karmi Grade-III from the date of initial appointment, he came up before this Court by filing a writ petition i.e. Writ Petition No.2193/2012 and this Court has passed an order directing the respondents to consider the case of the petitioner in light of the judgment delivered in the case of *Gopal Chawala Vs. State of M. P. and Others.*

7. The petitioner has further stated that thereafter, the respondents have passed an order and they have ordered recovery against the petitioner. It has been further stated that the representation of the petitioner has been rejected. The petitioner's contention is that he is entitled for pay scale of the post of

Samvida Shala Shikshak Grade-III right from inception in service i.e. 26/06/1997 and subsequent order dated 31/01/2015 passed by the respondents rejecting the representation of the petitioner is bad in law and the recovery order dated 09/06/2015 passed by the respondents is again bad in law.

8. The petitioner's contention is that the petitioner was holding qualification for the post of Shiksha Karmi and therefore, even though he was appointed as a Guruji, he is entitled for the pay scale of Guruji since 26/06/1997. The petitioner has prayed for quashment of the impugned order.

9. A detailed and exhaustive reply has been filed by the respondents and the stand of the respondents is that the petitioner was appointed under the Shiksha Guarantee Scheme, 1997 and under this scheme 20000 Majhra Tola Villages Primary School were established and Gurujis were appointed. The respondents have further submitted that appointment of Guruji was proposed by the community itself and the Guruji was a person belonging to the same Majhra Tola having minimum qualification of Higher Secondary.

10. It was also provided under the scheme that if in case local eligible person is not available having then the person having High School qualification could also be given appointment on honorarium basis. Schools were opened on the basis of the need of community. Respondents have enclosed M. P. Education Guarantee Scheme, 1997 alongwith the reply as Annex.-R/1.

11. The contention of learned counsel for the respondent is that at the time of appointment of Gurujis, there was no procedure nor recruitment rules were framed for appointment of Guruji under the Education Guarantee Scheme and the petitioner cannot compare his case with the teachers appointed under the various recruitment rules. It is further stated that under the M. P. Panchayat Samvida Shala Shikshak (Appointment and Service Conditions) Rules, 2001 and M. P. Panchayat Samvida Shala Shikshak Niyam, 2005 the respondents have conducted the recruitment process by calling candidature from the employment exchange for the post of Teacher and the petitioner has qualified the examination conducted by the State Government.

12. The respondent/State has further stated that the petitioner has been appointed on account of Recruitment Rules of the year 2005 and also on account of Recruitment Rules, 2012 which also provides for recruitment. The respondents have further stated that the process of recruitment for Gurujis as

well as Samvida Shala Shikshak is altogether different and Gurujis were permitted to appear in the examination conducted by the State Government. They were given 10 to 15 marks for their experience. Examination was held time and again in the year 2001, 2003, 2005 and 2008 and the Gurujis who were successful in eligibility test were appointed on the post of Samvida Shala Shikshak Grade-III.

13. The petitioner has also been given appointment on the post of Samvida Shala Shikshak Grade-III on the basis of the test conducted in the year 2008 as he has acquired the qualification for the post of Samvida Shala Shikshak Grade-III and he is entitled for pay scale of Samvida Shala Shikshak Grade-III only from the date he has been regularly appointed i.e. 11/10/2012. The respondents have also stated that those Gurujis who have completed three years of service are entitled for honorarium to the tune of Rs.2,875/- w.e.f. 17/04/2008.

14. The respondents have further stated that the petitioner was absorbed as Adhyapak by order dated 25/06/2015 on completion of three years of service, however, on account of wrong interpretation, on 19/02/2013, the petitioner was granted pay scale w.e.f. 26/06/1997. The respondents have further stated that the petitioner was appointed as Guruji on 26/06/1997 on a honorarium of Rs.1,000/- per month and he is entitled for enhanced honorarium w.e.f. 17/04/2008 to the tune of Rs.2,875/- and therefore, the excess amount received by the petitioner has to be refunded by the petitioner.

15. The respondents have further stated that the petitioner at the time he was given the arrears was directed to furnish an undertaking and the petitioner has furnished an undertaking that in case any adverse order is passed in favour of the petitioner he will refund the excess amount. Copy of the undertaking given by the petitioner is enclosed with the reply as Annex.-R/8.

16. The contention of the respondent/State is that the petitioner who was appointed as Guruji in the year 2007 cannot be paid regular pay scale of the post of Samvida Shala Shikshak Grade-III prior to his appointment on the post of Samvida Shala Shikshak Grade-III and therefore, the impugned order has rightly been passed.

17. Heard learned counsel for the parties at length and perused the record.

18. The undisputed fact reveals that by virtue of policy framed by the

State Government known as M. P. Education Guarantee Scheme of the year 1997, the Gurujis were appointed in the State of Madhya Pradesh. Gurujis were appointed in 20000 Majhra Tola Villages Primary Schools. The process of appointment of Gurujis was based upon the proposal submitted by the community. It was not a process of selection based upon any advertisement. The Gurujis were paid honorarium to the tune of Rs.1,000/- per month and the honorarium has been revised w.e.f. 17/04/2008 and the same is Rs:2,875/-.

19. The State Government has framed the Rules for appoint of Samvida Shala Shikshak Grade-III known as M.P. Panchayat Samvida Shala Shikshak (Appointment and Service Conditions) Rules, 2001 and 2005 as well as 2012. There is a process of recruitment provided for the post of Samvida Shala Shikshak Grade-III. The petitioner has participated in the process of selection and was issued an appointment order on 11/10/2012. The petitioner was later on absorbed after completion of three years of service as Adhyapak vide order dated 25/06/2015, meaning thereby, the petitioner prior to his selection as Samvida Shala Shikshak Grade-III vide order dated 11/10/2012 was a Guruji and he is certainly entitled for honorarium only for the post of Guruji.

20. In the earlier round of litigation, this Court has directed the respondents to consider the case of the petitioner in light of the order passed in *Gopal Chawala Vs. State of M. P. and Others,* Writ Appeal No.596/2010 and the petitioner's case was considered for appointment on the post of Samvida Shala Shikshak Grade-III, as he has qualified the examination he was appointed as Samvida Shala Shikshak Grade-III on 11/10/2012. However, the respondents by mistake on account of erroneous interpretation of the order passed by the Division Bench of this Court have granted pay scale of the post of Samvida Shala Shikshak Grade-III to the petitioner w.e.f. 2007. It is undisputed fact that the petitioner was not a Samvida Shala Shikshak Grade-III in the year 2007 and the respondents have rectified the mistake and excess amount paid to the petitioner is being recovered.

21. The petitioner at the time he was granted appointment on the post of Samvida Shala Shikshak Grade-III, was also granted arrears of salary and he has submitted an undertaking which is on record and the same reads as under:-

"प्रपत्र – तीन

वचन पत्र (Undertaking)

मैं विनोद राठौड़ आत्मज श्री कुवरजी राठौड़, निवासी – ग्राम–बबलाई, तहसील–महेश्वर, जिला–खरगोन (म.प्र.) निम्नलिखित वचन करती/करता हूँ कि:–

यह कि माननीय उच्च न्यायालय खण्ड पीठ इन्दौर की याचिका क/2193/2012 (एस) के तहत पारित निर्णयानुसार दिनांक 20/03/2012 के परिपालन में शिक्षाकर्मी/सहा. अध्यापक/संविदा शिक्षक/गुरूजी को उनकी नियुक्ति दिनांक से शिक्षाकर्मी वर्ग–3 के समान वेतन भत्ते का आदेश मुख्य कार्यपालन अधिकारी, जनपद पंचायत महेश्वर द्वारा आदेश क./स्था./2013 महेश्वर, दिनांक 19/02/2013 को दिया गया है । यह आदेश माननीय न्यायालय द्वारा पारित आदेश के अधीन जारी किया गया है । यदि भविष्य में शासन द्वारा अथवा माननीयय न्यायालय द्वारा विपरित आदेश जारी किया जाता है, तो यह आदेश स्वतः निरस्त मानकर प्राप्त राशि एक मुश्त विभाग को वापस करूंगा/करूंगी ।

दिनांकः– 21/02/2013 हस्ताक्षर शपथगृहिता

//सत्यापन//

मैं उपरोक्त शपथ ग्रहिता सत्यापित करता हूं कि उक्त वर्णित सभी जानकारी/तथ्य मेरे निजी ज्ञान व विश्वास के अनुसार सही एवं सत्य है ।

हस्ताक्षर शपथगृहिता"

22. This Court, keeping in view the aforesaid undertaking, is of the opinion that the respondents have rightly passed the impugned order dated 31/01/2015 and consequential recovery order 09/06/2015.

23. Not only this, the various judgments delivered on the subject matter has been brought to the notice of this Court. First judgment has been delivered by this Court in the case of *Gopal Chawala Vs. State of M. P. and Others* passed in W.P.No.3810/2009 (S). The learned Single Judge has dismissed the writ petition filed by Gopal Chawala by an order dated 24/09/2010 by which Gopal Chawala and other were claiming pay-scale at par with the Assistant Teacher. Thereafter, a writ appeal was preferred against the judgment dated 24/09/2010 and the Division Bench of this Court in Writ Appeal No.596/2010 *(Gopal Chawala and Others Vs. State of M. P. and Others)* has upheld the judgment of the learned Single Judge. Meaning thereby, there was no order for granting regular pay scale to the Gurujis.

24. Thereafter, another writ petition was preferred again by *Gopal*

Chawala i.e. W. P. No. 5963/2011 decided on 13/12/2011 reported in 2012(2) MPLJ 605 and paragraphs No.10 and 24 of the aforesaid judgment reads as under:-

> *"10. The doctrine of 'equal pay for equal work' is flowing from Article 39(d) of the Constitution of India. This Article is under the directive principles in the Constitution. This principle can be pressed into service when it is read with Article 14 of the Constitution of India. However, for making it a reality, one has to prove the wholesome equality.*
>
> *24. In totality, I am unable to hold that the petitioners are either entitled for equal pay for equal work or for even minimum of the scale because there is no wholesome parity demonstrated by them. I am also unable to hold that the petitioners are entitled to get minimum wages. However, on the basis of aforesaid analysis, I am inclined to direct the respondents to reconsider the amount of "honorarium" which is being paid to the petitioner in the present days of price hike. If necessary, the respondents may appoint an expert body for the said purpose. However, the entire exercise should be done keeping in view the principles flowing from Articles 23 and 43 of the Constitution of India."*

25. Learned Single Judge has held that Gurujis are not entitled for minimum of the pay of the post of Assistant Teacher instead of honorarium of Rs.2,500/, meaning thereby, there prayer for grant of pay scale at par with the Assistant Teacher was rejected by the learned Single Judge.

26. Another writ appeal was preferred by the same *Gopal Chawala and Others Vs. State of M. P. and Others* i.e. Writ Appeal No.53/2012 and the Division Bench of this Court after hearing learned counsel for the parties at length has dismissed the writ appeal by an order dated 01/02/2012. The matter was finally travelled to the apex Court and the Hon'ble Supreme Court of India in S.L.P.(C) No.18579/2012 decided on 30/10/2013 has dismissed the SLP preferred by Gopal Chawala, meaning thereby, prayer for grant of regular pay scale was rejected. However, the Hon'ble Supreme Court has held that

the order of learned Single Judge for enhancement of honorarium does not warrant any interference. Meaning thereby, this Court, the Division Bench of this Court and the Hon'ble Supreme Court has rejected the prayer for grant of regular pay scale / minimum of the pay scale to the Gurujis and an undertaking was given by the petitioner that he will refund the amount in case, the State Government arrives at a conclusion that he is not entitled for regular pay scale, from the date he was appointed as a Guruji.

27. The Hon'ble Supreme Court in the case of *High Court of Punjab and Haryana & Ors. Vs. Jagdev Singh* passed in Civil Appeal No.3500/2006 decided on 29/06/2016 has considered the matter of recovery. A plea was raised that there was no misrepresentation on the part of the employee therein and in those circumstances quashment of recovery was sought. Paragraphs No.9 to 13 of the aforesaid judgment reads as under:-

> *9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.*
>
> *10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:*
>
> > "(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

(emphasis supplied).

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.

12. For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period of two years.

13. The judgment of the High Court is accordingly set

aside. The Civil Appeal shall stand allowed in the above terms. There shall be no order as to costs."

28. In the aforesaid case also an undertaking by the employee therein was given for refunding the excess amount in case it is found that excess payment has been made and in those circumstances the apex Court has held the recovery to be lawful.

29. In light of the aforesaid, as the petitioner was appointed as Gurujis in the year 2007, he was appointed as Samvida Shala Shikshak Grade-III in year 2012 by an order dated 11/10/2012 and he was absorbed as Adhyapak on 25/06/2015, is certainly not at all entitled for a regular pay scale right from the year 2007. At the best he is entitled for pay scale of Samvida Shala Shikshak Grade-III only w.e.f. 11/10/2012 and pay scale to the post of Adhyapak only w.e.f. 25/06/2015 and therefore, in the considered opinion of this Court, the impugned order passed by the respondents does not warrant any interference. The writ petition is accordingly dismissed.

30. Resultantly, all the other connected writ petitions are hereby dismissed.

Certified Copy as per rules.

Petition dismissed.

I.L.R. [2017] M.P., 833
WRIT PETITION

Before Mr. Justice R.S. Jha & Mr. Justice C.V. Sirpurkar

W.P. No. 8194/2016 (Jabalpur) decided on 8 September, 2016

RENAISSANCE EDUCATION SOCIETY & anr. ...Petitioners

Vs.

NATIONAL COUNCIL FOR TEACHER EDUCATION & anr. ...Respondents

(Alongwith W.P. No. 9067/2016)

National Council for Teacher Education Act (73 of 1993) – Affiliation – Grant/Refusal thereof – Right of Inspection **– Petitioner, a private unaided self financed institution imparting training and education in teacher training courses of D.Ed/D.El.Ed – Petition against the order passed by Respondent Board to all Collectors of State of MP asking to conduct inspection of all institutions for purpose of renewal/grant of affiliation and also to inspect as to whether institutions**

have complied with conditions and requirements prescribed under the Act of 1993 – Held – Respondents may conduct a preliminary fact finding enquiry in respect of the institutions granted recognition under the Act of 1993 and regulations thereunder regarding violation of norms and standard prescribed therein and may also conduct inspection for affiliation but after doing so, if they find any such violation, they shall not take any action on their own and shall forward the enquiry report to the competent authority i.e Regional Committee constituted under the Act of 1993 for further action – Respondent Board shall not on their own take any action towards refusal of or withholding renewal or affiliation on account of any violation committed by petitioner institutions regarding norms and standard prescribed under the Act – With above observations, petition stands dismissed. (Para 2 & 26)

राष्ट्रीय अध्यापक शिक्षा परिषद अधिनियम (1993 का 73) – संबद्धीकरण – उसका प्रदान/इंकार – निरीक्षण का अधिकार – याची, एक गैर–अनुदानित स्ववित्त संस्था है जो कि डी.एड./डी.एल.एड. के शिक्षक प्रशिक्षण पाठ्यक्रमों में प्रशिक्षण एवं शिक्षा प्रदान करती है – प्रत्यर्थी बोर्ड द्वारा म.प्र. राज्य के सभी कलेक्टरों को संबद्धता के नवीकरण/प्रदान किये जाने के प्रयोजन हेतु सभी संस्थाओं के निरीक्षण का संचालन करने को कहे जाने एवं यह भी निरीक्षण करने हेतु कि क्या संस्थाओं ने 1993 के अधिनियम के अंतर्गत विहित शर्तों एवं अपेक्षाओं का अनुपालन किया, पारित आदेश के विरूद्ध याचिका – अभिनिर्धारित – प्रत्यर्थीगण 1993 के अधिनियम एवं उसके अधीन विनियमों के अंतर्गत मान्यता प्रदान की गई संस्थाओं के संबंध में, उक्त अधिनियम एवं विनियमों में विहित सन्नियमों एवं मानकों के उल्लंघन के बारे में तथ्य का पता लगाने प्रारंभिक जांच संचालित कर सकता है और साथ ही संबद्धता हेतु निरीक्षण भी कर सकता है, परंतु ऐसा करने के पश्चात् यदि वह ऐसा कोई उल्लंघन पाते हैं, वे स्वयं से कोई कार्रवाई नहीं करेंगे और सक्षम प्राधिकारी अर्थात् 1993 के अधिनियम के अंतर्गत आगे कार्रवाई करने हेतु गठित क्षेत्रीय समिति को जांच प्रतिवेदन अग्रेषित करेंगे – प्रत्यर्थी बोर्ड, याची संस्थाओं द्वारा अधिनियम के अंतर्गत विहित सन्नियमों एवं मानकों के संबंध में किये गये किसी भी उल्लंघन के कारण, इंकार करने अथवा नवीकरण या संबद्धता को रोकने के लिए, स्वयं से कोई कार्रवाई नहीं करेगा – उपरोक्त संप्रेक्षण के साथ, याचिका खारिज।

Cases referred:

(2015) 11 SCC 291, (2011) 4 SCC 527, W.P. No. 12323/2015 decided on 13.07.2016, W.P. No. 8632/2011 decided on 06.01.2012, W.P. No. 12453/2015 decided on 23.08.2016, W.P. No. 4205/2016 decided on 14.03.2016, W.P. No. 3368/2016 decided on 04.08.2016, (2000) 5 SCC 231.

Sidharth Gupta, for the petitioners.
Deepak Awasthi, G.A. for the respondent/State.
R.P. Tiwari, for the respondent NCTE.

ORDER

The Order of the Court was delivered by :
R.S. JHA, J. :- As both the aforesaid petitions raise a common issue for decision before this Court, they are heard and decided concomitantly.

2. The petitioners, who are private unaided self financing institutions imparting training and education in teacher training courses of D.Ed./D.El.Ed. and have obtained recognition under the relevant provisions of the National Council for Teacher Education, Act 1993 (hereinafter referred to as 'the Act of 1993') as well as affiliation from the respondent Board of Secondary Education, for establishing the institution and are running such Teachers Training Institution since the last 7 to 8 years, have filed these petitions challenging the order dated 27.4.2016 issued by the Secretary of the respondent Board to all Collectors in the State of M.P asking them to conduct inspection of all such institutions like the petitioners' institution for the purposes of renewal/ grant of affiliation and while doing so to also inspect as to whether the institutions have complied with the conditions and requirements prescribed and provided under the Act of 1993 and the Regulations framed thereunder. In the aforesaid order the Collector has further directed that the aforesaid inspection report should be submitted in a time bound manner so that the application for affiliation/renewal of affiliation may be considered by the authority concerned.

3. The learned counsel for the petitioners submits that the impugned order passed by the respondent Board directing the Collectors of the concerned district to conduct inspection is beyond the power and authority of the Board as the exclusive jurisdiction to conduct inspections and taking action in respect of violation of the norms and standards prescribed under the Act of 1993 and the Regulations framed thereunder, vests solely and exclusively with the Regional Committee constituted under the Act of 1993 and the Regulations framed thereunder and in such circumstances the impugned directions, being contrary to the provisions of the Act of 1993 and the Regulations framed thereunder and being without the authority of law, deserve to be quashed.

4. It is also submitted by the learned counsel for the petitioners that in view of the decision of the Supreme Court rendered in the cases of *Rungta*

Engineering College, Bhilai and Another vs. Chhattisgarh Swami Vivekanand Technical University and Another, (2015) 11 SCC 291, as well as the decision rendered in the case of *Chairman, Bhartia Education Society and Another vs. State of Himachal Pradesh and others*, (2011) 4 SCC 527, the affiliating body has no power to withhold or withdraw affiliation on the ground of violation and non-compliance of the conditions prescribed under the Act of 1993 and the Regulations framed thereunder and, therefore, the impugned order dated 27.4.2016 which indicates that the violation or non-compliance of the provisions of the Act of 1993 and the Regulations framed thereunder, would be taken into consideration for the purposes of considering the application for renewal and grant of affiliation is beyond the authority of the respondent Board and, therefore, the same be quashed.

5. The learned counsel for the petitioners has submitted that a Division Bench of this Court in the case of *Mittal Institute of Technology vs. State of M.P and others*, (W.P No.12323/2015) decided on 13.07.2016, has already held that the act of the respondent affiliating body refusing to grant affiliation on account of non-compliance or violation of the norms and standards prescribed under the A.I.C.T.E Act, which is in similar terms as the Act of 1993 and the Regulations framed thereunder, is contrary to law and has quashed the act of the respondent University therein refusing to grant affiliation for non-compliance of the norms prescribed under the AICTE Act, by relying upon the decision of the Supreme Court rendered in the case of *Rungta Engineering College* (supra).

6. The learned counsel for the petitioner has also relied upon the decisions of this Court rendered in the case of *Maa Kailadevi College of Education vs. State of M.P. and Another* (W.P No.8632/2011) decided on 6.1.2012 and *Adhar Ram Raj Mishra Shiksha Evam Swasthya Samiti vs. Nation Council for Teacher Education and Others*, (W.P No.12453/2015) decided on 23.8.2016, in support of the same submission. It is submitted that once three Division Benches of this Court have already held that such an action on the part of the affiliating body is not permissible in law, therefore, as the issue involved in the present petitions being similar, the impugned order dated 27.4.2016 deserves to be quashed and the petitions be allowed.

7. The learned counsel for the respondent Board, per contra, has filed a return and has stated that the respondent Board has been receiving several complaints in respect of institutions that have been granted recognition under

the Act of 1993 and the Regulations framed thereunder, to the effect that the institutions have not complied with the norms and standards prescribed thereunder. It is submitted that in view of the several complaints received by them, the respondent Board, which is the affiliating authority, has issued the impugned order with a view to ensure that the institutions duly comply with the conditions of affiliation and in case they have violated the norms and standards prescribed under the Act of 1993 and the Regulations framed thereunder, to forward the said instances of violation to the Regional Committee constituted under the Act of 1993 and the Regulations framed thereunder, for the purposes of taking action in accordance with law. The respondents have filed I.A No.12105/2016 in W.P No.9067/2016 for bringing on record the proposed action to be taken by the respondents on the basis of the report received by them which is in the following terms:-

> "3. That, it is submitted that such inspection is akin to a preliminary fact finding enquiry for the purpose of verification of the complaint received by the authorities. If in the inspection report, there are findings relating to non-conforming to the standards that have been prescribed by the NCTE, the answering respondent shall furnish the entire report/ findings observed by the Committee so constituted to the concerned authority of the NCTE without taking any action thereon as a representation under Section 17 of the Act of 1993 and that further action shall thereafter be taken up by the NCTE/ Regional Committee as the case may be, in accordance with law.
>
> 4. In other words, the **answering respondent does not propose to take up the action of withdrawing recognition of any of the recognized institution under the NCTE Act, 1993 on its own** and that it has only proposed to conduct a non-statutory preliminary fact finding enquiry in view of the complaint received by them in respect of most of the institutions and thus the impugned order does not call for any interference.
>
> 5. That, it is categorically stated that the answering respondent is not usurping or taking over the powers vested in the NCTE or the Regional Committee regarding withdrawal of recognition which still remains intact and can be invoked by

them at any point of time with absolute independence and without any fetters being placed upon them by the impugned order.

6. That, it is categorically submitted that in so far as the findings in regard to non-confirming to conditions of recognition (if any) is concerned, the answering respondent shall forward the same to the Regional Committee/NCTE for further action in accordance with law who may take up proceedings on their own or by treating the reports as representations or complaints under Section 17 of the Act of 1993.

7. That, it is submitted that the controversy in the present case is squarely covered by the judgment dated 04/08/2016 of this Hon'ble Court in *Sardar Vallabh Bhai Patel College of Education and others Vs. State of M.P. and others,* (W.P.No.3368/2016) wherein it was held that as the State submitted that it would not take any action against the petitioner institution therein for withdrawing their recognition and shall be only forwarding it to the Regional Committee for further action, therefore, the impugned order was not against any of the rights conferred upon the petitioner institution therein and did not call for any interference. As the facts of the instant case are similar to Sardar Vallabhbhai Patel case (supra), the instant case is liable to be dismissed.

8. That, it is submitted that if the report gives a finding that conditions(s) of affiliation have not been met by an institution, only then the answering respondent shall take steps towards withdrawing of affiliation from the said institution."

8. The respondents have placed reliance on the decision of the Division Bench of this Court in the case of *Maa Rewveti Educational & Welfare Society vs. National Council for Teachers' Education and others* (W.P No.4205/2016) decided on 14.03.2016, wherein this Court, after taking into consideration various judgments and the contention of the petitioners, has held that the affiliating body is not obliged to grant affiliation merely on grant of recognition under the Act of 1993 and the Regulations framed thereunder by the Regional Committee and that it is obliged to grant affiliation only if it is satisfied that the conditions for affiliation have been complied with by the

institution in accordance with the parameters and guidelines laid down by the State enactment and the Regulations framed thereunder, by placing reliance on the decision of the Supreme Court in the case of *Chairman, Bhartia Education Society and another vs. State of Himachal Pradesh and others,* (2011) 4 SCC 527. It is stated that in the aforesaid decision the Division Bench of this Court has clearly held that the affiliating body, while granting affiliation, has the power to examine as to whether the parameters for affiliation as well as norms for grant of recognition have been complied with by the institution or not.

9. The respondents have also relied upon the decision of this Court in the case of *Sardar Vallabh Bhai Patel College of Education and Others vs. State of M.P. and others* (W.P No.3368/2016 and connected matters) decided on 4.8.2016, wherein this Court, after analysing the provision of the Act of 1993 and the Regulations framed thereunder, has held that the State has the power to conduct a preliminary fact finding enquiry for the purposes of ascertaining as to whether the institutions are complying with the norms and standards prescribed under the Act of 1993 and the Regulations framed thereunder, and that the State on receipt of the report of such preliminary fact finding enquiry, finds that the institution is not doing so, it may forward its report to the competent authority under the Act of 1993 and the Regulations framed thereunder, for further action in accordance with law without taking any action on its own.

10. The learned counsel for the respondents submits that admittedly and undisputedly, the respondent Board has the power to conduct an inspection for the purposes of granting, refusing or renewal of affiliation and, therefore, the respondent Board has issued the impugned order dated 27.04.2016 and while doing so it has also been directed that in case the inspecting team finds violation of the norms of recognition prescribed under the Act of 1993 and the Regulations framed thereunder, a report in that regard has also been directed to be submitted which shall be forwarded to the Regional Committee under the Act of 1993 and the Regulations framed thereunder, for action in accordance with law. It is further submitted that as far as affiliation is concerned, if the inspecting team finds that the institution has not complied with the norms and standards prescribed for affiliation, the authority concerned shall take action in accordance with law in that regard for the purposes of withdrawing/ refusing affiliation.

11. We have heard the learned counsel for the parties at length. Before we proceed to decide the issue raised by the petitioners in the present petitions, it would be appropriate to enumerate and assimilate the undisputed facts that are on record.

12. In the present case it is an undisputed and admitted fact that the respondent Board is the affiliating authority for grant of affiliation to institutions like the petitioners who are imparting education in Teachers Training. It is also an undisputed and admitted fact that the procedure for affiliation has been prescribed and has been laid down by the respondent Board by their circular dated 22.2.2014, Annexure P-4 and that in para-17 of the aforesaid circular the respondent Board has expressly provided for conducting an inspection of any institution either itself or through the persons authorized by it with a clear stipulation that the institution concerned would be obliged to furnish all information to the authority conducting the inspection. It is also an admitted fact that as per the procedure prescribed in the circular, periodic inspection for the purposes of renew or extension/renewal of recognition is required to be conducted by the authorities of the Board. It is also an admitted and undisputed fact that in para-17 of the said circular the Board has the power to withhold or refuse affiliation granted to an institution. It is also an admitted and undisputed fact that the impugned order dated 27.4.2016 has been passed by the affiliating authority and not by the authority granting recognition and that the said order does not talk about withdrawal or cancelling of recognition but only provides for submitting a report regarding violation of the norms of recognition which shall be taken note of alongwith the case for considering renewal or refusal to grant affiliation.

13. In view of the aforesaid admitted and undisputed fact, we are not required to go into the issue as to whether the impugned order dated 27.04.2016 passed by the Board, which is the affiliating authority, is beyond jurisdiction as far as the contention of inspection, renewal or refusal to grant affiliation is concerned. On the basis of the argument of the learned counsel for the petitioner, the only issue required to be looked into by this Court is as to whether the direction in the impugned order to the effect that the inspecting team shall also enquire and find out as to whether the institution has complied with the norms and standard of recognition prescribed under the Act of 1993 and the Regulations framed thereunder, is beyond the jurisdiction of the Board and as to whether on the basis of the finding regarding violation of the norms

and standards of recognition prescribed under the Act of 1993 and the Regulations framed thereunder, the Board which is the affiliating body, has any power or authority to take any action regarding recognition against the institution concerned.

14. In this regard, the stand of the respondent in the present petition is worth noting. The respondent Board in its return as well as I.A.No.12105/2016 has clearly stated that it is the affiliating authority and admittedly has the power to conduct inspection in respect of affiliation, however, as they have received several complaints in respect of violation of the Act of 1993 and the Regulations framed thereunder, they have also instructed their inspecting team to conduct a preliminary fact finding enquiry regarding violation of the norms and standards prescribed by the NCTE, and on affidavit, have also specifically stated that in case they find that any norms and standards prescribed by the NCTE have been violated, they would not take any action against the institution in that regard but would forward their findings to the Regional Committee which is the competent authority under the Act of 1993 for further action. The respondents have specifically and categorically stated that as far as the inspection in respect of violation of the Act of 1993 and the Regulations framed thereunder is concerned, the respondent authorities would only be conducting a preliminary fact finding Enquiry for the purposes of forwarding the same to the Regional Committee for action either as a representation under Section 17 of the Act of 1993 or for the purposes of asking the Regional Committee to take action on its own.

15. In view of the aforesaid specific stand taken by the respondents before us on affidavit, it is apparent that the respondents have themselves clarified that they would not be taking any steps or adverse action or pass any orders against any institution recognized under the Act of 1993 in respect of recognition on account of violation or non-compliance of the norms and standard prescribed under the Act of 1993 or the Regulations framed thereunder and would only be forwarding their finding/report in this regard for appropriate action to the competent authority which is the Regional Committee under the Act of 1993 for further action.

16. This Court in the case of Sardar Vallabh Bhai Patel College of Education (W.P.No.3368/2016) (supra) after taking into consideration Articles 21-A, 47, 163, 256 as well as the provisions of Entry 66 of List-I of the 7th Schedule of the Constitution of India, and Entry 25 of List-III of the 7th

Schedule of the Constitution of India, and the provisions of the Act of 1993 and the Regulations framed thereunder, has held that the State has the power to conduct a preliminary fact finding enquiry as there is no provision relating to prohibiting or regulating such a preliminary a fact finding enquiry under the Act of 1993 or the Regulations framed thereunder moreso as the State proposes to forward the report of the fact finding enquiry to the Regional Committee constituted under the Act of 1993 for further action in accordance with law and does not intent to take any action on its own in that regard.

17. In the aforesaid decision, this Court has also categorically held that the State or the affiliation body has no power or authority to take action on its own in respect of violation of the norms and standard prescribed under the Act of 1993 or the Regulations framed thereunder, against an institution that has been granted recognition under the aforesaid provision, in the following terms in paras 60, 61, 69 & 70:-

> **"60.** Article 21-A of the Constitution of India, casts a mandatory duty upon the State to provide free and compulsory education of all children up to the age of 6 to 14 years in such a manner as the State may by law determine and Article 41 of the Constitution of India provides that the State shall within its economic capacity and development, make effective provision for securing the right to education and to public assistance in cases of unemployment. It is also undisputed that the petitioner institutions and the other institutions granted recognition under the Act of 1993 and the Regulations framed thereunder, are involved in imparting B.Ed. and M.Ed. degree courses and are, therefore, producing teachers in the State of M.P. who in turn would also be involved in imparting primary education to children of the age of 6 to 14 years which is an obligation of the State to provide under Article 21-A of the Constitution of India and, therefore, the State is vitally interested in ensuring that the petitioner institutions and the other recognized institutions under the Act of 1993, conform to the necessary standard so that these institutions are able to achieve the basic object of producing competent and qualified teachers and, therefore, the State cannot be expected to sit back with folded hands like an unconcerned by-stander and not act upon the

huge number of complaints that are received against the institutions recognized under the Act of 1993, imparting B.Ed. and M.Ed. degrees.

61. In the instant case it is not in dispute that while no law under Entry 25 List-III of the Constitution of India has been made by the State in this regard however, Article 162, subject to the provisions of the Constitution, extends the executive power of the State in matters with respect to which the Legislature of the State has powers to make laws, and Article 256 of the Constitution of India casts an obligation on the State to exercise its executive powers to fill up the lacuna and vacuum to ensure compliance of the law made by the Parliament which in the instant case is the Act of 1993.

69. In view of the aforesaid analysis of the provisions of the Act of 1993, the provisions of Article 21-A, 41, 162 and 256, Entry 66 of List I, Entry 25 of List-III of the Constitution of India and the fact that we have already held that the impugned order fills up a gap, lacuna and vacuum and is not in violation of any of the provisions of the Act of 1993 nor does it usurp any of the powers conferred on the authorities thereunder, therefore we are of the considered opinion that the State has the powers and authority to issue the impugned order under Article 162 and 256 of the Constitution of India in exercise of its executive power which is co-extensive with its legislative powers and in discharge of its obligation to ensure proper implementation of the parliamentary legislation, i.e. the Act of 1993 to uphold the high standard of education and, therefore, the same deserves to be and is hereby upheld.

70. We are also of the considered opinion that as the procedure of conducting a preliminary fact finding enquiry and forwarding the report thereof to the Regional Committee for initiating proceedings under Section 17 of the Act of 1993 that is provided and directed to be conducted by the impugned order is not covered by the Act of 1993 and the regulations framed thereunder and as there is a gap, lacuna and vacuum in that regard, the State in addition to its executive powers under

Articles 162 and 256 of the Constitution of India, has the power and authority to issue the impugned order in discharge of its constitutional duties and obligations and in exercise of its general power of governance and administration moreso as the impugned order does not violate or contravene any statutory provision."

17.(sic:18) It is pertinent to note that the present case stands on a better footing as in the present case admittedly the respondent Board has the power to conduct an inspection for the purposes of refusing or granting affiliation to the institution and therefore, as far as the authority of the respondent Board to conduct an inspection is concerned the same is not disputed.

19. In view of the aforesaid facts and circumstances, we are of the considered opinion that as far as the first issue raised by the petitioners is concerned, it is held that the respondent Board while conducting an inspection for the purpose of affiliation and even otherwise, has the power and authority to conduct a preliminary fact finding inspection even in respect of the compliance or non-compliance of the provisions of the Act of 1993 and the Regulations framed thereunder, but on receiving a negative report in that regard and in terms of the stand taken by the respondents before this Court, the respondent Board shall not take any action on its own in respect of the violation of the NCTE norms but shall simply forward the report in the regard to the concerned Regional Committee for further action in accordance with law.

20. At this stage, we may profitably take note of the fact that such a course of action has also been affirmed and upheld by the Supreme Court in the case of *Jaya Gokul Educational Trust Vs. Commissioner & Secretary to Government Higher Education Department, Thiruvanathapuram, Kerala State and another,* (2000) 5 SCC 231, wherein the Supreme Court while considering the powers and the authority under the AICTE Act viz-a-viz the authority of the State has held that if any fresh facts come to light and to the knowledge of the State after an approval has been granted by the AICTE or that it finds that some conditions attached to the permission granted under the AICTE have not been complied with, the State Government can always bring the instances of non-compliance to the notice of the authority of the AICTE in the following terms:-

"27. ....We may however add that if thereafter, any

fresh facts came to light after an approval was granted by AICTE or if the State felt that some conditions attached to the permission and required by AICTE to be complied with, were not complied with, then the State Government could always write to AICTE, to enable the latter to take appropriate action."

21. Similar view has been taken by Supreme Court in the case of *Rungta Engineering College, Bhilai* (supra) wherein the Supreme Court while quashing the action of the University withdrawing affiliation granted to the institution on account of violation of the norms prescribed under the AICTE Act has observed that at best the university should have forwarded its findings to the competent authority under the AICTE Act for further action in accordance with law.

22. As far as the reliance placed by the learned counsel for the petitioner on the decision of this Court in the case of *Mittal Institute of Technology* (supra) is concerned, we are of the considered opinion that the reliance placed there upon by the learned counsel for the petitioners is misplaced and misconceived, firstly on account of the fact that the issue involved in that petition related to the validity of the action taken by the authority in respect of a particular institution on findings violation of the Act of 1993 and the Regulations framed thereunder, which is not the case in the present petition as the issue involved in the present petition relates to challenge to a general order issued by the respondent Board asking the collectors to conduct preliminary fact finding inspections and submit reports to the authority which is competent to considered the application for renewal/ granting affiliation. In other words, the present case is not one where the respondents have taken any positive or coercive action against any institution recognized under the Act of 1993 in respect of violation of any of the norms and standard prescribed thereunder, but is a case where the respondent authorities who are competent to grant affiliation and conduct inspection in that regard, have issue orders to their committee to also conduct preliminary fact finding enquiry while conducting such inspections in respect of the fact as to whether violation of the NCTE norms have been committed by any institution or not with a further stipulation made before this Court on affidavit to the effect that in case such violation are found such cases would be forwarded to the Regional Committee constituted under the Act of 1993 for further action.

23. Secondly, in that decision the learned counsel for the parties did not

place before the Court the observations made by the Supreme Court in the case of *Jaya Gokul Educational Trust* (supra) nor was it brought to the notice of the Court that in such cases the proper course that was available to the affiliating body was to forward the report to the competent authority under the Act of 1993, as has been held in the case of *Rungta Engineering College, Bhilai* (supra) itself and, therefore, the aspect of quashing the order and thereafter referring the matter to the competent authority under the Act of 1993 and the Regulations framed thereunder, was neither considered nor decided.

24. For the same reason the reliance placed by the learned counsel for the petitioners on the decision of this Court rendered in the case of *Maa Kailadevi College of Education* (supra) also does not help the cause of the petitioners in any way. The decision relied upon by the learned counsel for the petitioners in the case of *Adhar Ram Raj Mishra Shiksha Evam Swasthya Samiti Vs. National Council for Teacher Education & Others,* (W.P. No.12453/2015) decided on 23.08.2016 also does not rendered any assistance to the petitioners on account of the fact that the said decision relate to refusal to grant NOC and rejection of the application for recognition on account of not filing the NOC along with the application for recognition which is not the issue involved in the present case. Quite apart from the above, it is worth noting that this Court in the aforesaid case was dealing with the provision for obtaining and filing an NOC which is in fact provided by and under the Regulations framed under the Act of 1993 by the Parliament itself and not by the State. In other words, the provision for an NOC accompanying the application for recognition is prescribed and provided under the Central Act itself and, therefore, has no applicability to the issue involved in the present case which relates to the power and authority of the affiliating body to conduct a preliminary fact finding inspection in respect of violation of the NCTE norms alongwith the regular inspection conducted by it for the purpose of granting or refusing affiliation.

25. In the case of *Maa Reweti Educational & Welfare Society* (supra) this Court by placing reliance on the decision of *Chairman, Bhartia Education Society* (supra) has held in para-23 as under:-

> "Indubitably, affiliation is granted by the affiliating body as per the provisions of the State enactment. The fact that recognition is already granted by NCTE to a given institution, does not necessarily mean that the affiliating body is obliged to

grant affiliation – unless it is satisfied about compliances made by the institution of all parameters under the State enactment and Regulations framed thereunder. Recognition by NCTE may be a condition precedent, but, that does not absolve the affiliating body to examine all relevant matters and record its satisfaction in that behalf. This position is no more *res integra.* In the case of *Chairman, Bhartia Education Society vs. State of Himachal Pradesh* (supra) in para 17, the Supreme Court has observed that there is no mandate against the Examining Body to grant affiliation to the institution on receipt of order of NCTE granting recognition to such institution, though the recognition given by NCTE may be a condition precedent for grant of affiliation. The Examining Body can still refuse affiliation with reference to any of the factors which have already been considered by NCTE while granting recognition. In view of this settled legal position, even though this Court has allowed the writ petitions, on which reliance was placed by the petitioners referred to in the opening part of the judgment, the affiliating body will be free to and must examine all aspects of the matter relevant for grant of affiliation and decide the proposal of the concerned institution on its own merits. We may also observe that in the light of this pronouncement, even NCTE is not obliged to issue recognition to concerned institution(s), unless it records satisfaction about the fulfillment of all pre-conditions."

26. In view of the aforesaid facts and circumstances, we are of the considered opinion that the present petitions filed by the petitioners as far as it relate to challenge of the impugned order dated 27.04.2016 deserves to be and is hereby dismissed with the following observations:-

1. That the respondent authorities, as stated on affidavit by them before this Court, may conduct a preliminary fact finding enquiry in respect of the institution granted recognition under the Act of 1993 and the Regulations framed thereunder, regarding violation of the norms and standard prescribed in the aforesaid Act and Regulation alongwith the inspection for affiliation, but after doing so

and in case they find any such violation they shall not take any action on their own in respect of such violation and shall forward the preliminary fact finding enquiry report to the competent authority i.e. the Regional Committee constituted under the Act of 1993 and the Regulations framed thereunder, for further action in accordance with law and that the Regional Committee shall thereafter proceed further by initiating proceedings under the Act of 1993 in accordance with law.

2. That the respondent Board shall not take any action towards refusal of or withholding renewal or affiliation on account of any violation committed by the petitioner institutions in respect of the norms and standard prescribed under the Act of 1993 and the Regulations framed thereunder, unless some statutory provision empowers it to do so, but would have full liberty, power and authority to withdraw or refuse to grant affiliation to the institution concerned in case of any violation of the norms and standard for affiliation prescribed by them.

27. The petitions stand dismissed with the aforesaid directions. In the facts and circumstances of the case there shall be no order as to costs.

Petition dismissed.

I.L.R. [2017] M.P., 848
WRIT PETITION

Before Mr. Justice P.K. Jaiswal & Mr. Justice D.K. Paliwal
W.P. No. 7474/2015 (Indore) decided on 14 September, 2016

SIR AUROBINDO COLLEGE DENTISTRY ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

Dentists Act, (16 of 1948), Section 10-B as amended by Amendment Act, (30 of 1993) **– High Court cannot disturb that balance between the capacity of the institution and the number of admissions on "Compassionate ground" and to issue a fiat to create additional seat which amounts to a direction to violate the provision. (Para 22)**

दंत–चिकित्सक अधिनियम (1948 का 16), धारा 10–बी, संशोधन अधिनियम (1993 का 30) द्वारा यथासंशोधित – उच्च न्यायालय "अनुकंपा आधार" पर संस्थान की क्षमता एवं प्रवेश की संख्या के मध्य संतुलन पर बाधा नहीं डाल सकता एवं अतिरिक्त स्थान सृजित करने हेतु आदेश जारी करना उपबंध का उल्लंघन करने के लिए एक निदेश की कोटि में आएगा।

Case referred:

2001 (8) SCC 427.

Meena Chaphekar, for the petitioner.
Vivek Sharan, for the respondent No. 2.
P. Bhargava, Dy. A.G. for the respondent No. 3/State.
None for the respondents No. 1, 5, 6 & 7.

ORDER

The Order of the Court was delivered by : **P.K. JAISWAL, J. :-** By this writ petition under Article 226 of the Constitution of India, the petitioner is praying for quashment of the impugned orders / communications dated 14.8.2014 (Annexure P/1), 9.12.2014 (Annexure P/2) and show cause notice dated 12.10.2015 (Annexure P/3), issued by the respondent No.2, Dental Council of India, on the ground that though there was no seat of MDS Course of Conservative Dentistry under State Quota, the DME allotted one seat of MDS Conservative Dentistry to one Deepak Singh Kirar through the counselling dated 9.6.2014 to 16.6.2014, and accordingly, in compliance to the order passed by the Director, Medical Education, Bhopal, the 4th Seat had to be given admission under the State Quota.

2. The petitioner – institute is unaided Private Professional Dental College established in the year 2006. The admission in Private Medical & Dental Colleges in the State are regulated through Madhya Pradesh Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 (hereinafter referred as 'The Adhiniyam') and exercising its power conferred under Section 4(1) & (2) of the Adhiniyam. The State Government has constituted Admission and Fee Regulatory Committee (hereinafter referred as 'AFRC) for the supervision and guidance of the admission process and for the fixation of the fees to be charged for a candidate seeking admission for the Private Professional Education Institutions.

3. In compliance of the order passed by the Constitutional Bench of the Apex Court in the case of *Islamic Academy of Education V/s. State of Karnataka*, an association has been registered with the name of "Association of Private Dental & Medical Colleges of Madhya Pradesh (APDMC)" to conduct a Common Entrance Test for admission to management quota seats of Private Medical & Dental Colleges of the State of Madhya Pradesh.

4. The Apex Court vide it's order dated 27.5.2009, passed in I.A.No.4060 / 2009 (arising out of SLP No.13111 / 2009), has directed to fill the seats of Private Medical & Dental Colleges of M.P. in a ratio of 50:50 between the State and Management after excluding 15% NRI Seats (which have to be filed (sic:filled) by the management), through PRE-PG (Entrance Exam Conducted by the Central / State Government) and DMAT (Entrance Exam Conducted by the APDMC) for this purpose, and in accordance with the same first NRI quota seats were decided by the college and thereafter, the remaining seats were distributed in a ratio of 50:50 between the State & Management Quota.

5. In the year 2014, the Apex Court vide order dated 11.4.2014 (I.A.No.71/72) in Civil Appeal No.4060 /2009, directed to continue the same arrangement, which was in vogue from year 2009.

6. In the year 2014, All India PRE-P.G. Entrance Examination was conducted on 25.1.2014 and thereafter counselling was conducted from 25.3.2014 to 13.3.2014 (sic:30.3.2014) and vide allotment letter dated 29.3.2014, one student Deepak Singh Kirar, was allotted MDS Conservative Dentistry Course for the petitioner – College through State quota. As per directives of the Apex Court, the said distribution was done by the State of M.P. and the same was published on 27.3.2014 vide (Annex. R-3/1). As per Annexure R2/2, filed by Dental Council of India, the petitioner – college was permitted to take admission in MDS course including Conservative Dentistry Course with intake capacity of 3 seats, which was subsequently renewed by the Government of India for the academic year 2014 – 15. In this letter, the Government of India very categorically stated that in case, any admissions are made in violation of the condition, such admission would be treated as irregular and action under Section 10-B of the Dentists (Amendment) Act, 1993 would be initiated.

7. The petitioner vide its letter dated 19.4.2014 has mentioned that the

one seat in the MDS Conservative Dentistry Course from the State quota, but later has issued correction.

8. On 28.5.2014, the Dental Council of India issued a circular to all Dental Colleges of the country to furnish the MDS students admitted in the college during the academic year 2014-15. The petitioner vide letter dated 5.7.2014 (Annexure R-2/4) informed the DCI that there was no seat of MDS to Conservative Dentistry under the said quota. The DME allotted one seat in MDS Conservative Dentistry to one student through counselling dated 9.6.2014 to 16.6.2014 and accordingly, fourth student was also given admission under the State quota in MDS course and now there are four candidates in the MDS Conservative Dentistry against the permitted three seats by respondent No.1 – Union of India (letter dated 15.4.2014 Annexure R2/2) for the academic year 2014-15. On 27.9.2014, the petitioner – Dental College furnished the list of students admitted by them in MDS Course in the academic session 2014-15.

9. The DCI vide its letter dated 14.8.2014, directed the petitioner Dentistry – college to discharge one student admitted in excess in MDS Conservative Speciality of Conservative Dentistry Course for the academic session 2014-15, as the Govt. of India vide letter dated 15.4.2014, have granted its permission to admit only 3 students in the MDS Course, failing which Section 10B of the Dentists (Amendment) Act, 1993 shall be attracted.

10. The DCI also issued a letter to the petitioner – Dental College to clarify as to why they admitted 3 students in the MDS course in the academic session 2014-15, after the cut off date, ie., 5.8.2014 fixed by the Apex Court in I.A.No.18/2014 in W.P. (C) No.433 / 2014 for the academic session 2014-15, which is gross violation of the time schedule fixed by the Apex Court, within 8 days from the issue of the letter.

11. The petitioner – Dental College submitted the chart of distribution of seats filled through all India PRE-PG 2014 to respondent No.4 on 19.4.2014 (Annexure P/8). As per letter Annexure P/8, the distribution of seats appended along with the said letter, out of 3 seats of Conservative Dentistry and Endodnotic of the petitioner – college two seats have to be filled up through DMAT and one by the Government. On 22.4.2014, vide Annexure P/9, again distribution of seats was given by the petitioner -Dentistry college stating therein that out of 3 Conservative dentarian Endodnotic seats, two is to be filled by

NRI quota and one by DMAT. As per this document, no State quota seat in the subject of Conservative Dentistry and Endodnotic. The DMAT 2014 conducted by APDMC (respondent No.6) took place in the month of April 2014 and on the basis of merit of this exam, through counselling dated 4th and 5th May, 2014, all the three seats of the petitioner – college were allotted to the students and admissions were given by the petitioner/Dental college.

12. As per averments made in the writ petition, the Director of Medical Education allotted one seat of MDS to one Deepak Singh Kirar, through the counselling dated 9.6.2014 to 16.6.2014. The petitioner – college on coming to know about it vide letter dated 13.6.2014 apprised of the situation to the DMAT and requested to provide guidance, but he did not provide any guidance and insisted that admission is going to be cancelled who has been allotted seat to the student under quota in MDS Conservative Dentistry.

13. The Executive Committee of the DCI in it's meeting held on 17.11.2014, considering the AFRC letter dated 9.10.2014, thereby, forwarding three clarifications on the matter of excess admission made by the petitioner – college in Conservative Dentistry for the academic session 2014-15 and decided as under :-

> *"The college authorities be directed to discharge one student admitted in excess in MDS course in the specialty of Conservative Dentistry for the academic session 2014-15 at Sri Aurobindo College of Dentistry, Indore against GOI's letter No. V12017/57/2011-DE dated 15.4.2014 for permission to admit only 3 students in the specialty of Conservative Dentistry for the academic session 2014-15, under intimation to Dental Council of India failing which the Council shall take necessary action against the college as per Dentists Act, 1948 as amended from time to time and its regulations made thereunder."*

14. On 19.1.2015, the DCI again directed the petitioner dentistry college to discharge one student admitted excess in the department of Conservative Dentistry for the academic session 2014-15, within 10 days from the date of issuance of the letter. The DCI vide letter dated 24.2.2014 directed the following :-

"The Director, Medical Education, Government of

Madhya Pradesh be requested to identify the student admitted in excess in MDS Course in the specialty of Conservative Dentistry for the academic session 2014-15 at Sri Aurobindo College of Dentistry, Indore and issue necessary directions to the college authorities of Sri Aurobindo College of Dentistry, Indore to discharge on student, immediately, from the specialty of Conservative Dentistry, as identified/decided by the DME, under intimation to Dental Council of India, failing which the Council shall take necessary action against the college as per Dentists Act, 1948 as amended from time to time and its regulations made there-under."

15. The DCI again vide letter dated 19.3.2015 and 29.6.2015 directed the respondent No.4, Director of Medical Education to identify students admitted in excess in MDS College specially in Conservative Dentistry for the academic session 2014-15 and issued necessary direction to the dentistry college for discharging the student immediately. The DCI informed the decision of the Executive Committee of DCI in its meeting held on 27.8.2015 and directed the following :-

"The request of O.S.D./Secretary, Secretariat, Admission and Fee Regulatory Committee, Bhopal (Madhya Pradesh) to regularize one admission made in excess of the sanctioned intake in MDS course of Conservative Dentistry in the session 2014-15 at Sri Aurobindo College of Dentistry & P.G. Institute, Indore cannot be considered, and the college authorities be directed to discharge the student admitted in excess in Conservative Dentistry for the academic session 2014-15, within 21 days positively, under intimate to DCI, failing which the Council shall initiate the process of withdrawal of recognition of degrees in respect of BDS and MDS students of Sri Aurobindo College of Dentistry & P.G. Institute, Indore."

16. Due to interim order passed by this court, no coercive action has been taken by the DCI and Union of India.

17. As per reply filed by the respondents 3 and 4/State, All India P.G.

Entrance Examination was conducted on 25.1.2014 and thereafter, the counseling was conducted from 25.3.2014 to 30.3.2014 and vide allotment letter dated 29.3.2014, one student Deepak Singh Kirar was allotted admission in MDS Conservative Dentistry course in the petitioner – college through State quota. Annexure R-3/1 is the chart of seat distribution i.e., the distribution of vacant seat as on 27.3.2014. As per Annexure R-3/1, in the petitioner – dentistry college one seat is reserved for State quota for Schedule Tribes candidate. The petitioner also vide its letter dated 19.4.2014 (Annexure P/8) has mentioned that one seat in MDS Conservative Dentistry course was from the State Quota, but later on issued correction in the list of distribution chart and without order from DME filled all the 3 seats under NRI / Management Quota. The allotment letter dated 23.9.2014 was issued in accordance with the distribution of vacant seat made by the Director of Medical Education on 27.3.2014. The counselling in the State quota seats by the respondents was done from the period 25.3.2014 to 30.3.2014, whereas, the counselling for the seat through MDS 2014 was conducted by APDMC, Bhopal from the period 9.6.2014 to 16.6.2014.

18. As per the directives of Hon'ble the Supreme Court, the seat distribution was done by the State and the same was published on 27.3.2014. Even petitioner / dentistry college itself vide its letter dated 19.4.2014 has mentioned that the one seat in MDS Course of Conservative Dentistry from the State Quota, but later has issued correction. As per the stand taken by the State, the counselling was made in accordance with the distribution of vacant seats made by the State / respondent on 27.3.2014. The State in its reply has stated that the counselling in the State Quota seat was done from 25.3.2014 to 30.3.2014 whereas, the counselling for the seats through DMAT, 2014 was conduced by APDMC, Bhopal.

19. The respondent No.1 – Union of India granted renewal to the petitioner – Dentistry college only on the condition that no irregular admission will be made by the Dental College and if Dental College violates any admission then under Section 10-B of the Dentists (Amendment) Act, 1993, would be initiated and in the case in hand, the petitioner – college admittedly took one student in excess in MDS Conservative Speciality of Conservative Dentistry Course for the academic session 2014-15, which is irregular admission and the respondent No.2 DCI had only asked the Dentistry petitioner – college to discharge one excess admission. Inspite of repeated reminders by the DCI to discharge one

excess student the petitioner – dental college choose not to discharge one student and, therefore, proceedings has been initiated for derecognizing of the dental qualification under Section 10B of the Dentist (Amendment) Act, 1993.

20. In the case of *MCI V/s. Sarang & Ors*. reported as 2001 (8) SCC 427 the Apex Court observed that in the matters of academic standards, courts should not normally interfere or interpret the rules and such matters should be left to the experts in the field.

21. An 'intake' or admission capacity is fixed by the concerned authority, having regard to the facilities available. That is why the concerned authority makes local inspections to determine the facilities provided and available. Once an intake is fixed with reference to the available facilities and teaching and other staff it can be increased only after the institution provides correspondingly larger facilities and staff and satisfies the concerned authority about the need for such increase and its capacity to manage and train the increased intake. It cannot be gainsaid that the position of students admitted in excess of the permitted intake, is the same as the students of an unrecognised institution. Merely because an institution is permitted and recognised, the students admitted by such institution in excess of permitted intake cannot claim a better position or right either for regularisation or for grant of permission, as they are in no better position than the students of an unrecognised institution. The petitioner has not filed any document to prove that Director of Medical Education granted admission to Deepak Singh Kirar nor such was the stand of the Government of M.P.

22. Looking to the totality of the facts and circumstances of the case, we cannot accept the contention of the petitioner – Dental College that they will keep seat vacant in the Special Conservative Dentistry in the next academic year 2015-16 against the sanctioned capacity of three seats that will be contrary to the permission granted by the Government of India. Taking into consideration the infrastructure, equipment, staff, the limit of the number of admissions is fixed by the DCI, this Court cannot disturb that balance between the capacity of the institution and the number of admissions, on "compassionate ground" and to issue a fiat to create additional seat, which amounts to a direction to violate Section 10-B of the Dentists Act. In the case of *MCI V/s. Sarang & Ors.* (supra), Hon'ble the Supreme Court observed that in the matters of academic standards court should not normally interfere or interpret

the rules and such matters should be left to the experts in the field.

23. For these reasons and looking to the conduct of the petitioner – Dental College, no case is made out to quash the proceedings of the DCI. The petitioner – Dental College is the author of the situation.

24. In view of the foregoing discussion, we find no merit and substance in the writ petition. The same is, accordingly, dismissed.

No order as to costs.

Petition dismissed.

I.L.R. [2017] M.P., 856
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 5446/2015(s) (Indore) decided on 28 November, 2016

NIRMAL KUMAR JAIN ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Civil Services (Pension) Rules, M.P. 1976, Rule 9 – **Petitioner challenging the order of withholding 100% pension and clause (Kha) of GAD circular no, C-6-2/98/3/1 dated 08.02.1999 – Held – As per language of circular, first part denies the applicability of principle of natural justice which is foundational and fundamental concept against undue exercise of power of authority – Principle of natural justice consist with two components "Audi Alteram Partem" i.e., nobody shall be condemned unheard and "Nemo debtet esse Judex in propria Sue causa", i.e. Nobody shall be judge in own case – Audi Alteram Partem is fundamental in governance to the rule of Law – The principle of natural justice is implied even the statute do not contemplate so, particularly when the order passed by authority is prejudicial to the affected person, and effects the civil consequences, otherwise the order cannot be said to have passed with fairness and judicially – Condition of denial of issuance of notice and affording an opportunity in the circular is arbitrary, unfair and unjust. (Paras 9 to 14)**

क. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9 – याची ने 100% पेन्शन रोकें जाने के आदेश एवं सामान्य प्रशासन विभाग परिपत्र क्र. सी–6–2/98/3/1

दिनांक 08.02.1999 के खंड(ख) को चुनौती दी – अभिनिर्धारित – परिपत्र की भाषा के अनुसार, प्रथम भाग नैसर्गिक न्याय के सिद्धांत जो प्राधिकारी की शक्ति का असम्यक्/अनुचित प्रयोग के विरूद्ध मौलिक एवं मूलभूत सिद्धांत है की प्रयोज्यता अस्वीकार करता है – नैसर्गिक न्याय के सिद्धांत में दो घटक शामिल हैं "दूसरे पक्ष को भी सुनो" अर्थात् किसी को भी बिना सुने दोषी नहीं ठहराया जायेगा और "कोई भी व्यक्ति अपने मामले का स्वयं निर्णायक नहीं हो सकता" – दूसरे पक्ष को भी सुना जाना, विधि के नियम के शासन में मूलभूत है – नैसर्गिक न्याय का सिद्धांत विवक्षित है यद्यपि कानून ऐसा अनुध्यात नहीं करता, विशिष्ट रूप से जब प्राधिकारी द्वारा पारित आदेश, प्रभावित व्यक्ति पर प्रतिकूल प्रभाव डालता है और जिसके सिविल परिणाम होते हैं, अन्यथा आदेश को निष्पक्षता से एवं न्याय रूप से पारित किया जाना नहीं कहा जा सकता – परिपत्र में नोटिस जारी करना एवं अवसर प्रदान करना अस्वीकार करने की शर्त मनमानी, अनुचित एवं अन्यायपूर्ण है।

B. *Service Law – Withdrawal of Pension* – **In case of withdrawal of pension to which it has already been granted for about 24 years, without opportunity to explain the circumstances as specified in the circular, cannot be said to be in conformity to the spirit of Rule 9 – Clause (Kha) of GAD circular except the condition to pass an order by council of ministers is contrary to Rule 9 and is unreasonable – Circular C-6-2/98/3/1 dated 08.02.1999 is arbitrary, unjustified, unreasonable and violative of principle of natural justice – Also contrary to spirit of Rule 9 – Hereby quashed.** **(Para 17 & 20)**

ख. सेवा विधि – पेन्शन वापस ली जाना – परिस्थितियों को स्पष्ट करने का अवसर दिये बिना पेन्शन, जिसे पहले ही करीब 24 वर्षों तक प्रदान किया जा चुका है, को वापस लिये जाने के मामले में, जैसा कि परिपत्र में विनिर्दिष्टित है, नियम 9 की भावना के अनुरूप नहीं कहा जा सकता – सामान्य प्रशासन विभाग के परिपत्र का खंड(ख), मंत्रीमंडल द्वारा आदेश पारित करने की शर्त को छोड़कर, नियम 9 के विपरीत है एवं अयुक्तियुक्त है – परिपत्र सी–6–2/98/3/1 दिनांक 08.02.1999 मनमाना अनुचित, अयुक्तियुक्त एवं नैसर्गिक न्याय के सिद्धांत का उल्लंघन करने वाला है – साथ ही नियम 9 के भावार्थ के विपरीत भी है – एतद् द्वारा अभिखंडित।

C. *Service Law* – **Judicial Proceedings after retirement – Petitioner attained superannuation on 31.01.1991 w.e.f. 01.02.1991 – Getting full pension on issuing PPO by State Government – Offence registered against him on 25.01.1995 – Challan filed on 11.01.1998 – Date of institution of criminal case against petitioner was after 6 years and 11 months, which is not permissible as per Rule 9(3) of Pension**

Rules – In case, judicial proceedings is barred looking to the date of institution – Government cannot take decision of withdrawal of pension – Decision taken by the council of ministers in the name of governor without taking note of the said discussion is contrary to spirit of Rule 9 – Pension is hard earned benefit which accrues to an employee and is in the nature of "Property" – Right of property cannot taken away without the due process of law – Order of withdrawing pension is wholly unjustified, unreasonable, arbitrary and violative of principles of natural justice, liable to be quashed. (Para 19)

ग. सेवा विधि – सेवा निवृत्ति पश्चात् न्यायिक कार्यवाही – याची ने 31.01.1991 को 01.02.1991 से प्रभावी अधिवार्षिकी प्राप्त की – राज्य सरकार द्वारा पीपीओ आदेश जारी करने पर पूर्ण पेंशन प्राप्त कर रहा है – उसके विरूद्ध 25.01.1995 को अपराध पंजीबद्ध किया गया – 11.01.1998 को चालान प्रस्तुत किया गया – याची के विरूद्ध दाण्डिक प्रकरण संस्थित करने की तिथि, 6 वर्ष एवं 11 माह पश्चात् की है जो कि पेंशन नियमों के नियम 9(3) के अनुसार अनुज्ञेय नहीं – प्रकरण में न्यायिक कार्यवाहियाँ, संस्थित किये जाने की तिथि को देखते हुए वर्जित है – सरकार पेंशन वापस लेने का निर्णय नहीं ले सकती – मंत्रीमंडल द्वारा उक्त चर्चा को ध्यान में लिए बिना राज्यपाल के नाम से लिया गया निर्णय, नियम 9 की भावना के विपरीत है – पेंशन एक कष्ट से अर्जित लाभ है जो एक कर्मचारी को प्रोद्भूत होता है और "संपत्ति" के स्वरूप का है – संपत्ति के अधिकार को विधि की सम्यक् प्रक्रिया के बिना समाप्त नहीं किया जा सकता – पेंशन वापस लेने का आदेश पूर्णतः अन्यायपूर्ण, अयुक्तियुक्त, मनमाना एवं नैसर्गिक न्याय के सिद्धांतों का उल्लंघन है, जो अभिखंडित किये जाने योग्य है।

Cases referred:

AIR 1978 SC 597, (2014) 16 SCC 392, (1973) 1 SCC 120, AIR 1976 SC 667, AIR 1985 SC 514, AIR 1997 SC 3387, (1999) 8 SCC 378, (2005) 7 SCC 605, (2006) 7 SCC 651, (1996) 2 SCC 305, 2013 (12) SCC 210, 1983 (1) SCC 305.

A.K. Sethi with *Awadhesh Polekar,* for the petitioner.
Pushyamitra Bhargava, Dy. A.G. for the State.
V.P. Khare, for the respondent No. 3.

ORDER

J.K. MAHESHWARI, J. :- Invoking the jurisdiction under Article 226 of the Constitution of India, challenging the order Annexure P-3 dated

30.6.2015 passed by the State Government withholding the entire pension after 24 years and also challenging the circular dated 8.2.1999 Annexure P-5 Clause (Kha) thereof issued by the General Administration Department (for short GAD), relied by respondents to pass the order impugned Annexure P-3, however seeking quashment of the both, this petition has been preferred.

2. The facts unfolded in the present petition are, the petitioner attained the age of superannuation from the post of CEO, Indore Development Authority (in short 'IDA') on 31.1.1991. He remained posted there during the period of 12.1.1989 to 31.1.1991 at Indore. After his retirement an offence was registered by Lokayukta establishment at Crime No. 4/1995 on 25.1.1995 wherein challan was filed against him on 11.1.1998 under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act (in short it be referred as 'P.C. Act,). The Sessions Court in S.T. No. 1/98 vide judgment dated 21.4.2011 convicted the petitioner and directed to undergo the sentence of two years, R.I. with fine Rs.1 Lakh.

3. It is pleaded after the superannuation, P.P.O. was issued and he was getting regular pension with effect from the date 1.2.1991. After four years of the judgment of conviction and more than 24 years of retirement, he was served with the order Annexure P-3 dated 30.6.2015, directing to withhold 100% pension permanently, relying upon the circular Annexure P-5 dated 8.2.1999 and also in reference to Rule 9 of M.P. Civil Services (Pension) Rules, 1976 (hereinafter referred to as the Pension Rules), However, challenging the impugned order of withholding the pension and clause (kha) of the GAD circular bearing No. C-6-2/98/3/1 dated 8.2.1999, this petition has been preferred. It is inter alia contended that clause (kha) of the circular runs contrary to the spirit of Rule 9(1) of the Pension Rules and also against various judgments of the Apex Court because it violates the principle of natural justice. It is further contended that the condition stipulated in the circular that prior notice is not necessary is arbitrary and unjustified. Even otherwise withholding of pension after making the payment for a long time, leads to affects civil consequence to a retired employee, however, without affording an opportunity, passing an order withholding the pension is unsustainable. It is urged that order impugned has not been passed by the Governor who is competent under Rule 9 of Pension Rules, therefore, order impugned passed by the Government and Clause (kha) of the circular may be quashed.

4. On the other hand, respondents/State have filed their reply inter alia

contending, on receiving the information of the judgment of conviction and sentence, the Housing and Environment Department was informed by the Collector, and submitted a proposal to withhold entire pension. However, as per the recommendation of the Lokayukt establishment, order withdrawing the complete pension for the remainder period of life was passed by the State Government after consultation with M.P Public Service Commission vide communication letter Annexure P-4. The power of the Governor has rightly been exercised by the Council of Ministers on 9.6.2015, who decided to withdraw and withhold the pension of petitioner. In the reply, circular dated 27.6.2011 of Finance Department has also been referred though it has not been filed along with return, It is said, after the conviction and sentence by the Sessions Court and due to the loss caused to the Government, the order impugned has rightly been passed. In reply to para 5, it is said, affording an opportunity to observe the principles of natural justice is not necessary in view of the GAD circular dated 8.2.1999. It is relevant to state, nothing has been stated in the reply how clause (kha) of circular dated 8.2.1999 do not run contrary to the spirit of Rule 9 of Pension Rules, At this stage Shri Pushyamitra Bhargava, learned Dy. Advocate General contends bare reading of Rule 9, makes it clear that the Governor reserves the right, but the power to withhold the pension, can be exercised by the Council of Ministers under the rules of business, however in exercise of the powers of the Governor the order has rightly been passed by the Council of Ministers vide Annexure R-1 dated 16.6.2015 in reference to clause (kha) of the circular dated 8.2.1999 however, interference in this petition is not warranted.

5. By filing the rejoinder, it is pleaded by petitioner that he stood superannuated on 31.1.1991 and offence was registered on 25.1.1995 at Crime No. 4/1995 to which Challan was filed on 11.1.1998. However, as per Pension Rules the date of taking the cognizance by the Court, would be the date of filing the challan which is after 7 years of retirement. In terms of Rules 9(3) and Rule 9(6)(b) of the Pension Rules, the pension of an employee cannot be withheld if challan is not filed within the time specified in the rules. It is further said, the work order was issued on 19.11.1992 to M/s Khurana Construction Private Limited, but prior to the date of issuance of the work order, petitioner had attained the age of superannuation, therefore, no loss is caused to the Government by an act done by him. The construction was carried out by the Contractor as per work order issued following the tender process, however the conviction of the petitioner is also not in accordance to Law.

6. Shri V.P. Khare, counsel for M.P. Public Service Commission contends that on consultation with the Commission, who gave concurrence to the decision of the Government vide letter Annexure P-4, however re-stating the same facts and submission as advanced by the counsel for State Government, prayer is made to dismiss the writ petition.

7. In the present case, the order of withholding 100% pension and clause (kha) of GAD circular Annexure P-5 bearing No. C-6-2/98/3/1 dated 8.2.1999 is under challenge. After hearing learned counsel for the parties and in the facts of the present case, it is to be noted here that opportunity of hearing has not been afforded to petitioner relying upon Clause (kha) of the said circular. Petitioner has assailed the circular contending that it runs contrary to Rule 9 of Pension Rules and also against various Judgments of the Apex Court. However, to understand Clause (kha) of the circular, it is reproduced as under :-

> (ख) ऐसे सेवानिवृत्त शासकीय सेवक जिनके विरूध्द विभागीय जांच प्रारंभ नही की गई हो एवं जिन्हें आपराधिक प्रकरण में दण्डित किया गया हो।
>
> ऐसे सेवानिवृत्त शासकीय सेवक जिनके विरूध्द विभागीय जांच प्रारंभ नही की गई हो एवं जिन्हें आपराधिक प्रकरण में दण्डित किया गया हो उनकी पेंशन म.प्र. सिविल सेवा (पेंशन) नियम, 1976 के नियम 9 के उप नियम (एक) के अंतर्गत स्थायी रूप से रोकने के लिये शासन सक्षम है। ऐसे प्रकरणों मे भी संबंधित शासकीय सेवक को पूर्व सूचना देना आवश्यक नहीं है। पेंशन रोकने संबंधी अंतिम आदेश मंत्रि–परिषद् द्वारा पारित किये जावेंगे। ऐसे शासकीय सेवकों, जिनकी नियुक्ति लोक सेवा आयोग के माध्यम से हुई, के विषय में सर्वप्रथम आयोग का मत प्राप्त किया जावेगा। तत्पश्चात् आयोग के मत सहित प्रकरण मंत्रि–परिषद् के समक्ष प्रस्तुत किया जावेगा।
>
> उक्त श्रेणी के अंतर्गत आने वाले प्रकरणों मे प्रस्तुत की जाने वाली टीप तथा पेंशन रोकने संबंधी दण्डादेश का प्रारूप क्रमशः संलग्न परिशिष्ट ख–1, ख–2 पर है।

8. On perusal of the above clause makes it clear, an employee against whom a departmental enquiry has not been initiated and such employee has been convicted in judicial proceedings, the power to withhold the pension may be permanently directed under Rule 9(1) of the Pension Rules. Prior to passing the order, issuance of notice is not necessary and the order can be passed by the Council of Ministers after consultation with the M.P. Public

Service Commission. Along with the circular, format of the order has also been specified. However, to pass an order of withholding the pension what procedure ought to follow, in this respect Rule 9 of Pension Rules is relevant which confers power to the Governor to withhold or withdraw the pension, which is reproduced as under :-

> **9. Right of governor to withhold or withdraw pension.-(1)** The Governor reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from pension of the whole or part of any pecuniary loss caused to the Government if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement:
>
> Provided that the State Public Service Commission shall be consulted before any final orders are passed:
>
> Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the minimum pension as determined by the Government from time to time;
>
> **(2)(a)** The departmental proceedings, if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced, in the same manner as if the Government servant had continued in service:
>
> Provided that where the departmental proceedings are instituted by an authority subordinate to the Governor, that authority shall submit a report regarding its findings to the Governor.
>
> **(b)** The departmental proceedings, if not instituted while the Government servant was in service whether before his

retirement or during his re-employment:-

(i) shall not be instituted save with the sanction of the Governor;

(ii) shall not be in respect of any event which took place more than four years before such institution; and

(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings:-

(a) in which an order of dismissal from service could be made in relation to the Government servant during his service in case it is proposed to withhold or withdraw a pension or part thereof whether permanently or for a specified period: or

(b) in which an order of recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders could be made in relation to the Government servant during his service if it is proposed to order recovery from his pension of the whole or part of any pecuniary loss caused to the Government.

(3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

(4) In the case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension and death-cum-retirement gratuity as provided in rule 64, as the case may be, shall be sanctioned:

Provided that where pension has already been finally sanctioned to a Government servant prior to institution of

departmental proceedings, the Governor may, by order in writing, withhold, with effect from the date of institution of such departmental proceedings fifty per cent of the pension so sanctioned subject however that the pension payable after such withholding is not reduced to less than the minimum pension as determined by the Government from time to time:

Provided further that where departmental proceedings have been instituted prior to the 25th October, 1978, the first proviso shall have effect as it for the words "with effect from the date of institution of such proceedings" the words "with effect from a date not later than thirty days from the date aforementioned," had been substituted:

Provided also that-

(a) If the departmental proceedings are not completed within a period of one year from the date of institution thereof, fifty per cent of the pension withheld shall stand restored on the expiration of the aforesaid period of one year;

(b) If the departmental proceedings are not completed within a period of two years from the date of institution the entire amount of pension so withheld shall stand restored on the expiration of the aforesaid period of two years; and

(c) If in the departmental proceedings final order is passed to withhold or withdraw the pension or any recovery is ordered, the order shall be deemed to take effect from the date of the institution of departmental proceedings and the amount of pension since withheld shall be adjusted in terms of the final order subject to the limit specified in sub-rule (5) of rule 43.

(5) Where the Government decided not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the court.

The perusal of Rule 9(1) indicates, the Governor himself reserves right to withhold or withdraw the pension or a part thereof, permanently or for a specified period and also have right to make recovery from pension of any pecuniary loss caused to the Government in any departmental or judicial proceedings, if the pensioner is found guilty during the period of his service including the period of re-employment after retirement. The said order may be passed in consultation with the Public Service Commission. It has also been specified, when part of pension is required to withheld, its amount shall not be reduced below the minimum pension as determined by the Government from time to time. Rule 2(a) deals a situation when departmental proceedings instituted while Government servant was in service, in the said event, the departmental proceedings would continue as per the rules prevalent and it would be concluded by the same authority by which those proceedings have commenced but such authority shall submit a report regarding his finding to the Governor. Rule 2(b) applies to the cases where the departmental proceedings were not instituted while the Government servant was in service, however, in such cases, it shall not be instituted save with the sanction of the Governor and it shall not be in respect to the event which took place more than four years before such institution and it be conducted by such authority at such place as the Government may direct similar to the procedure applicable to the departmental proceedings. However, in those, proceedings, in case if, employee was in service and an order of dismissal could be passed by the result thereof then it may be proposed to withhold or withdraw the pension or its part permanently and in case of causing the pecuniary loss, which could be

recoverable from his pay may be proposed to be recovered from the pension either whole or in part. Sub-Rule 3 applies to the judicial proceedings which starts from non-obstante clause, by which if such proceeding is not instituted while the Government servant was in service before his retirement or during re-employment, shall not be instituted in respect of cause of action which arose in respect of an event took place more than four years before such institution. The word "institution" has been clarified for the purpose of this rule, by Rule 6(b)(i) by which it is apparent that in criminal proceeding it be deemed to be instituted on the date on which on the complaint or report of police officer the Magistrate takes cognizance, and for a civil case, the date of presentation of the plaint in the Court. Rule 9(4) indicates that the Government Servant who retired on attaining the age of superannuation or otherwise against whom any departmental or judicial proceeding instituted which are continuing, a provisional pension and death-cum-retirement gratuity as provided in Rule 64 shall be sanctioned. It has also been clarified that when the pension has already been finally sanctioned to a Government Servant prior to institution of departmental proceedings, the Governor may by order in writing withhold it with effect from the date of institution of such departmental proceeding, 50% of the pension so sanctioned subject to that pension payable after such withholding is not reduced to less than minimum pension. It is also clarified in case, the departmental proceeding is not completed within a period of one year from the date of institution out of the order of withholding passed under Rule 4, withholding 50% shall stand restore on expiration of one year and if those proceedings have not been completed within two years, then entire amount of pension so withheld shall stand restore on expiration of the said period of two years but after final order is passed to withhold or withdraw the pension or any recovery is ordered and such order shall deem to take effect from the date of institution of the departmental proceeding and the amount of pension since withheld shall be adjusted in terms of the final order subject to the limits specified in Sub rule 5 of Rule 43 of the Pension Rules. In case, the Government decided not to withhold or withdraw the pension, the recovery shall not be made @ exceeding 1/3rd of the pension permissible on the date of retirement of the Government Servant. Thus, legislative intent is very clear that power to withhold or withdraw the pension or its part, permanently or for a specified period, the Governor himself reserves right under the statute. The said right continues with the Governor to pass an order to withhold or withdraw pension and recovery from the pension either whole or part in the departmental or judicial proceedings. After retirement, the proceedings if required to be

started, it may be with the sanction of the Governor but if already started it may continue with the authority who is having the power to initiate the said proceeding, if such employee continues to be in service. However, the findings, whatever, is recorded by such authority be brought before the Governor who may exercise the power of withholding or withdrawing or recovery by passing the order. Safeguard have also been specified under what circumstances the order of withholding and withdrawing of the pension can be passed in case the proceedings started within four years of retirement either of the departmental proceedings or of judicial proceedings.

9. Clause (Kha) of the GAD circular dated 8.2.1999 deals the contingency in case of retired government employees, who is convicted in criminal case in judicial proceedings, the Government is competent to withhold the pension permanently, without prior notice to such employees and the order can be passed by Council of Ministers, which shall be implemented after consultation with the Public Service Commission. As per the language of the said circular, first part denies the applicability of Principle of Natural Justice, which is foundational or fundamental concept against undue exercise of the powers by an authority. The Principle of Natural Justice consist with two components; *Audi alteram partem* i.e. Nobody shall be condemned unheard and *"Nemo debet esse judex in propria sua causa"* i.e. Nobody shall be a judge in his own cause. In the case at hand the validity of the circular has been assailed due to denial of the maxim *Audi alteram partem.* In the said context the judgment of Constitutional Bench in the case of *Maneka Gandhi Vs. Union of India* reported in AIR 1978 SC 597 can be profitably referred, which makes it clear that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. The rule that a party to whose prejudice an order is intended to be passed, is entitled to a hearing, it applies alike to Judicial tribunals and bodies of persons invested with the authority to adjudicate upon the matters involving civil consequences. It is one of the fundamental rules of our constitutional set up that every citizen is protected against exercise of arbitrary authority by the State or its officers. The duty to act judicially would, arise from the very nature of the function intended to be performed. If there is power to decide and determine to the prejudice of a person, duty to act

judicially is implicit in exercise of such power. If the essentials of justice is ignored and an order to the prejudice of a person is made, such order is nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case. The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable, therefore, the Principle of Natural Justice put the check on unrestricted power of an authority to affect the rights of the person. The act of the authority should not be influenced by the vice of discrimination, and it must be fair and just and should not be suffered from vice of arbitrariness or unreasonableness. However, in case where the decision of the authority entails civil consequences and the petitioner is prejudicially affected, he must be given an opportunity to be heard.

10. Hon'ble the Apex Court in the case of *Nisha Devi Vs. State of Himachal Pradesh and others* reported in (2014) 16 SCC 392 emphasized the importance of the principle of Natural justice under the administrative law, it has observed that the principle of *Audi alteram partem* admits of no exception and has to be adhered to in all circumstances. Before arriving at any decision which has serious implications and consequences to any person, he must be heard in his defence. The constitutional Bench in the case of *State of Punjab Vs. K.R. Erry and Sobhag Rai Mehta* reported in (1973) 1 SCC 120 in the context of pensionary benefits has laid down following three principles:-

(i) Pensionable benefits are not merely bounty but property to which they are entitled.

(ii) Though the State Government may have had some material before it for imposing a penalty by way of a cut in the pension, it had failed to give a reasonable opportunity to the officers to put forward their defence or facts in extenuation before the cut was imposed.

(iii) Where a body or authority is judicial or where it has to determine a matter involving rights judicially because of express or implied provision, the principle of natural justice *audi alteram partem* applies.

11. The Court emphasizing the importance of natural justice applying the

maxim *audi alteram partem,* it has observed that in the case of Administrative authority passing order affecting the rights and interest of another, fairness and elementary justice require to offer reasonable opportunity to show cause. The Apex Court in the case of *State of Punjab and another Vs. Iqbal Singh* reported in AIR 1976 SC 667 has reiterated that the pension is the right of a Government servant to receive. It is the property under Articles 31(1) and 19(1)(f) of Constitution of India. The cut of pension without issuing show cause notice and affording opportunity of hearing is not permissible. In the case of *Shiv Shanker and another Vs. Union of India and others* reported in AIR 1985 SC 514, the applicability of Natural justice came for consideration before the Apex Court in the context of forfeiture of past service on account of participation of the employee in illegal strike. The Court held that without issuing show cause notice and affording opportunity against proposed action, is in violation of principle of Natural Justice and is liable to be quashed.

12. In the case of *Union of India and another Vs. G. Ganayutham (Dead) by LRs* reported in AIR 1997 SC 3387, the Apex Court has considered the power of withholding or withdrawing of the pension, which includes gratuity The Court emphasizing the scope of judicial review against administrative action the principle of proportionality has summarized stating the grounds on which it can be gone into. The Court held that to judge the validity of any administrative order or statutory discretion normally the Wednesbury test is to be applied to find out the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at such conclusion. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bonafide. The Court may also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him nor could the Court substitute its decision to that of the administrator.

13. In the case of *Gajanan L. Parnekar Vs. State of Goa and another* reported in (1999) 8 SCC 378, the Apex Court held the notice to show cause and to give opportunity is the duty against the person who is going to be adversely affected, before recalling an administrative order, which was in his favour, If the order has been passed without affording opportunity, it is held

to be violative of prirciple of Natural Justice. In *Bhaurao Dagdu Paralkar Vs. State of Maharashtra and others* reported in (2005) 7 SCC 605, the Apex Court has considered that passing order of withdrawal of Freedom Fighter pension, which was payable under the Scheme on the ground that some of the Freedom Fighters played fraud, however, directed each person must be given opportunity prior to passing any adverse order against them. In that view of the matter, the order passed by the High Court was set aside. In the case of *State of W.B. Vs. Haresh C. Banerjee and others* reported in (2006) 7 SCC 651, the Apex Court has held that the pension could be withheld on compliance of stipulation of the Pension Rules, however, in the said context the stipulation of the Pension Rules can be gathered by the authority prior to taking a final decision in the matter and an opportunity of hearing must be afforded to.

14. In view of various pronouncements of the Apex Court, it is apparent that the maxim *Audi alteram partem* is fundamental in governance to the Rule of Law. If any adverse order is being passed against any employee or person, which includes pension or gratuity, an opportunity of hearing deserves to be granted. The principle of Natural Justice is implied even the statute do not contemplate so, particularly when the order passed by the authority is prejudicial to the affected person, and effects the civil consequences, otherwise the order cannot be said to have passed with fairness and judicially, therefore, denial of an opportunity of hearing by the circular is against the various pronouncements of the Apex Court, therefore condition of denial of issuance of notice and affording an opportunity in the circular is arbitrary, unfair and unjust.

15. It is further required to be analyzed whether Clause (Kha) of GAD circular by which an opportunity of hearing has been denied is in the context of spirit of Rule 9 of the Pension Rules and is reasonable. In the light of the judgment of the Apex Court in the case of *State of M.P. and others Vs. Dr. Yashwant Trimbak* reported in (1996) 2 SCC 305 wherein it has been observed that the decision for withholding of pension can be taken by the Council of Ministers in discharge of the executive function of the Governor. It is to be noted here that the petitioner has not made any challenge in the petition in this regard. However, this Court is not touching the viability of the said condition.

16. In the present case, the order of withdrawal of pension is under

challenge. Though Clause (Kha) of the GAD circular which is made applicable deals with the situation of withholding of the pension. It is to be explained here that withholding and withdrawing of the pension are two different acts. Prior indicates a cheque in payment of pension while later deals with a situation wherein pension has already been paid and now it is required to stop or take back. Present one is the case of withdrawal of pension after making payment for more than 24 years, therefore, looking to the language of GAD circular, which deals with the contingency of withholding, the said condition is not applicable.

17. Rule 9(4) of the Pension Rules applies for withholding and withdrawal both on a discretion of the Government either whole or in part with other benefits while the circular refers complete withholding of the pension in the context of Rule 9, therefore, it is not in consonance with the spirit of Rule 9. In addition having complete glance of Rule 9 makes it clear that either withholding or withdrawing in whole or in part is a discretion of the Government to which various contingencies have been specified therein. On plain reading of the scope of Rule 9 makes it clear that the complete pension ought not to be withheld. However, in a case of withdrawal to which pension has already been granted for about 24 years without opportunity to explain the circumstances as specified in the circular cannot be said to be in conformity to the spirit of Rule 9, however, it is unreasonable. In this view of the matter, I do not have any hesitation to hold that Clause (Kha) of the GAD circular except the condition to pass an order by the Council of Ministers is contrary to the spirit of Rule 9 and is unreasonable.

18. The above discussion emphasizes the importance of principle of natural justice in the context and applicability of the maxim *audi alteram partem* and the said principle is foundational and fundamental to eliminate the injustice to establish the rule of law. The case in hand is a case of withdrawal of pension of a Government Servant after paying it for 24 years, however, to understand the factual aspects, why non-observance of the said principle may adversely affect the petitioner causing injustice with him, therefore, factual scenario of the case is analyzed in succeeding paragraphs.

19. The petitioner had attained the age of superannuation on 31.1.1991 and with effect from 1.2.1991, he was getting full pension on issuing PPO by the State Government. The offence was registered against him on 25.1.1995 at Crime No.4/1995 by Lokayukt Establishment. After conducting the

investigation challan was filed on 11.1.1998, on which date cognizance was taken by the Court. By that time, the period of more than six years and eleven months were elapsed from the date of retirement. Rule 9(3) contemplates that no judicial proceeding be instituted against a Government Servant in respect of a cause of action or in respect of an event which took place more than four years before such institution. Rule 6(b) defines the 'institution' of criminal case by which, it is clear that it would be a date on which either on the complaint or on the report of the police officer, the Magistrate takes cognizance. However, the date of institution of criminal case against the petitioner was after six years and eleven months, which is not permissible as per Rule 9(3) of the pension rules. In case, the judicial proceeding is barred looking to the date of institution, the Government cannot take decision of withdrawal of pension. However, decision taken by the Council of Ministers in the name of Governor without taking note of the said discussion is contrary to spirit of Rule 9. Hon'ble the Supreme Court in the case of *State of Jharkhand and others vs. Jitendra Kumar Srivastava and another* 2013(12) SCC 210 has held that the right to receive pension is recognized as a right to receive property Such right can only be taken away as per the procedure prescribed by law. In absence of any statutory provision, such right cannot be taken away under the garb of administrative instructions, as such instructions are not 'law' within the meaning of Article 300A of Constitution of India. The Apex Court has relied upon the judgment of *D.S. Nakara and others vs. Union of India* 1983(1) SCC 305, the Court referred the observations made therein which is reproduced as under :-

> "The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised ? Is the employer, which expression will include even the State, bound to pay pension ? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service ? What is a pension ? What are the goals of pension ? What public interest or purpose, if any, it seeks to serve ? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date ? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

> The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad vs. State of Bihar and Ors. [1971 Su. S.C.R. 634] wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but it is governed by the rules and a Government Servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. vs. Iqbal Singh (1976 IILLJ 337 SC)".

It is thus clear that the pension is hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law. It is to note here that with effect from the date of retirement i.e. 1.2.1991 till passing the order impugned dated 30.6.2015, the pension was paid to the petitioner for more than 24 years and abruptly on 30.6.2015 the order withdrawing the pension was passed which caused serious prejudice to him, therefore, such order is wholly unjustified, unreasonable, arbitrary and violative of principles of natural justice, therefore, it is liable to be quashed.

20. In view of the foregoing discussion, it is held that clause (kha) of the G.A.D. Circular bearing No. C-6-2/98/3/1 dated 8.2.1999 (Annexure P/5) is arbitrary unjustified, unreasonable and violative of principle of natural justice and also contrary to the spirit of Rule 9, therefore, it is hereby quashed. In the facts of this case, it is further held that the order impugned passed by the respondent withdrawing pension is in violation of the principles of natural justice and contrary to the provisions of Rule 9, therefore, quashed. In consequence thereto, petitioner would be entitled to get pension as he was receiving prior to passing the order impugned.

21. Accordingly, the petition filed by the petitioner succeeds and is hereby allowed. In the facts, parties to bear their own costs.

Petition allowed.

I.L.R. [2017] M.P., 874
WRIT PETITION
Before Mr. Justice S.K. Seth
W.P. No. 11729/2011 (Jabalpur) decided on 2 January, 2017

GEETA OMRE (SMT.) ...Petitioner
Vs.
SMT. CHANDRAKANTA RAI & anr. ...Respondents

A. ***Court Fees Act (7 of 1870), Section 7(iii) & 7(iv)(c) – Under valuation and deficit court fees*** **– Facts – Respondent/plaintiff filed a suit for declaration that gift deed executed by plaintiff (mother of the petitioner) in favour of petitioner/defendant is null & void – Objection regarding under valuation and deficit court fees by defendant/petitioner was rejected by trial Court – Held – The plaintiff (mother) being executant of the gift deed in favour of defendant (daughter) has parted with possession of the property, so in this light of the fact the order impugned herein is unsustainable in the eyes of law and therefore set aside – Trial Court directed to reconsider and decide the objection of the petitioner/defendant afresh – Petition disposed of. (Paras 9 to 11)**

क. न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iii) व 7(iv)(c) – न्यून मूल्यांकन एवं न्यायालय फीस में कमी – तथ्य – प्रत्यर्थी/वादी ने इस घोषणा हेतु वाद प्रस्तुत किया कि वादी (याची की माता) द्वारा याची/प्रतिवादी के पक्ष में निष्पादित दान विलेख अकृत एवं शून्य है – विचारण न्यायालय द्वारा प्रतिवादी/याची का न्यून मूल्यांकन एवं न्यायालय फीस में कमी से संबंधित आक्षेप अस्वीकार किया गया – अभिनिर्धारित – प्रतिवादी (पुत्री) के पक्ष में दान विलेख का निष्पादक होने के नाते, वादी (माता) सम्पत्ति के कब्जे से विलग हुई है, इस प्रकार तथ्य के आलोक में, यहां आक्षेपित आदेश विधि की दृष्टि में कायम रखने योग्य नहीं और इसलिए अपास्त किया गया – विचारण न्यायालय को याची/प्रतिवादी के आक्षेप पर पुनःविचार करने और नये सिरे से विनिश्चित करने के लिए निदेशित किया गया – याचिका निराकृत की गई।

B. ***Court Fees Act (7 of 1870), Section 7(iii) & 7(iv)(c) – Payment of Court Fees*** **– Deed of transfer/conveyance – Executant or**

non-executant – Ad-Valorem or fixed – Three situations discussed.
(Para 8)

ख. न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iii) व 7(iv)(c) – न्यायालय फीस की अदायगी – अंतरण/हस्तांतरण का विलेख – निष्पादक या गैर निष्पादक – मूल्यानुसार या निश्चित – तीन स्थितियों की चर्चा की गई।

Case referred:

AIR 2010 SC 2807.

Pranay Verma, for the petitioner.
Mohd. Ali, for the respondent No. 1.

ORDER

S.K. Sethi, J. :- This petition under Article 227 of the Constitution of India is directed against the order dated 30.8.2010 passed by the trial Judge in a Civil Suit No.1-A/2010.

2. By the order impugned, trial Judge has rejected the objection of the petitioner with regard to non-payment of ad-valorem court-fee on the plaint.

3. Respondent/plaintiff (mother of the petitioner) out of love and affection executed two gift deeds of even date 13.10.2009 in respect of house and land appurtenant thereto, to the petitioner by a gift deed dated 13.10.2009 and handed over possession of the gift and handed over possession of the gifted properties to the petitioner. The gift deed was duly accepted by the petitioner.

4. After some time, plaintiff filed a suit for declaration that the gift deeds executed by her in favour of the petitioner were null and void and *non-est and* not binding on the plaintiff. While contesting the suit on merit, petitioner also raised objection regarding the under valuation of the relief claimed in the suit and non-payment of requisite court fee thereon.

5. Learned trial Judge after hearing arguments, over-ruled the objection by the order impugned, hence this petition.

6. We have heard rival submissions at length and perused the material of record.

7. Shri Verma, appearing for petitioner submitted that the gift deed was

executed by the mother voluntarily, without any consideration in respect of a immovable properties and as such upon acceptance of the gift deed, the title in respect of immovable property stood conveyed the petitioner. Therefore, plaintiff has to pay requisite court fee. On the other hand, Shri Ali submitted that suit is under values and proper court fee has been paid to avoid the gift deeds. He further submitted that order impugned does call for any interference by this Court under Article 227.

8. After careful consideration of submissions, I find force in the contention of Shri Verma in view of the decision of the Supreme Court reported in *AIR 2010 SC 2807*, wherein, the Supreme Court has held as under:-

> "Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or *non-est,* or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to "A" and "B" – two brothers. "A" executes a sale deed in favour of "C". Subsequently "A" wants to avoid the sale. "A" has to sue for cancellation of the deed. On the other hand, if "B", who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by "A" is invalid/void and *non-est* / illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court-fee is also different. If "A", the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court-fee on the consideration stated in the sale deed. If "B" who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay fixed court-fee of Rs.19.50 under Article 7(iii) of Second Schedule of the Court Fee Act. But if "B", a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court-fee as provided under Section 7(iv)(c) of the Act.

9. From perusal of the material available on record, it is also clear that at the time of the gift made by the mother of the daughter, she has parted the possession of the property.

10. In view of the forgoing discussion, the order impugned is unsustainable in law and therefore, is liable to be set aside.

11. The trial Court is directed to consider and decide the objection raised by the petitioner/defendant regarding the payment of Court Fee afresh in accordance with law.

Accordingly, petition is disposed of.

Order accordingly.

I.L.R. [2017] M.P., 877
WRIT PETITION
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Alok Verma
W.P. No. 2625/2016 (Indore) decided on 24 April, 2017

STATE BANK OF INDIA & anr. ...Petitioners
Vs.
VISHWAS SHARMA ...Respondent

(Alongwith W.P. No. 1040/2016)

A. ***Industrial Disputes Act (14 of 1947), Section 11 A – Power of the Tribunal*** **– In a departmental enquiry, workman/ respondent was ordered to be dismissed from service – Tribunal converted the punishment of dismissal into compulsory retirement holding that workman having rendered 15 years of service, punishment of dismissal is not justified and at the same time to enable the workman earn his pension – Held – Insertion of Section 11A to the Act confers power to the Tribunal to re-appreciate the evidence and also interfere on the quantum of punishment – Tribunal can examine as to whether the finding of misconduct recorded by the employer is fair and reasonable and even if such finding is in favour of the employer, Tribunal can interfere in the order of punishment – This jurisdiction is not vested in the Writ Court or Civil Court – No illegality done by Tribunal while interfering with the quantum of punishment. (Para 9 & 10)**

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 11 ए – अधिकरण की शक्ति – विभागीय जांच में, कर्मकार/प्रत्यर्थी को सेवा से पदच्युति हेतु आदेशित किया गया था – अधिकरण ने पदच्युति की शास्ति को अनिवार्य सेवा निवृत्ति में संपरिवर्तित किया यह अभिनिर्धारित करते हुए कि कर्मकार द्वारा 15 वर्ष की सेवा दिये जाने के कारण, पदच्युति की शास्ति न्यायोचित नहीं है एवं इसके साथ ही कर्मकार को अपनी पेंशन उपार्जित करने के लिए सक्षम बनाया जाना – अभिनिर्धारित – अधिनियम में धारा 11ए की प्रविष्टि, अधिकरण को साक्ष्य का पुनर्मूल्यांकन करने और साथ ही शास्ति की मात्रा में मध्यक्षेप करने के लिए शक्ति प्रदत्त करती है – अधिकरण परीक्षण कर सकता है कि क्या नियोक्ता द्वारा अभिलिखित अवचार का निष्कर्ष निष्पक्ष एवं युक्तियुक्त है तथा यदि उक्त निष्कर्ष नियोक्ता के पक्ष में हो तब भी, अधिकरण शास्ति के आदेश में मध्यक्षेप कर सकता है – यह अधिकारिता रिट न्यायालय या सिविल न्यायालय में निहित नहीं है – शास्ति की मात्रा में मध्यक्षेप करने में अधिकरण द्वारा कोई अवैधता नहीं की गई।

B. State Bank of Indore (Employees') Pension Regulation, 1955, Regulation 33 – Entitlement of Pension – **Under Regulation 33, workman would not be entitled to pension if an order of punishment of dismissal has been substituted by compulsory retirement unless workman is entitled to pension on superannuation – Order of punishment of compulsory retirement may not entitle the workman for the benefit of pension but the intention of the Tribunal is categorical so as to entitle him to pensionary benefits – The issue, that pension cannot be paid, was neither raised before the Tribunal nor examined at the time of rendering award by Tribunal – Matter remitted back to Tribunal on the point of punishment so as to make the workman eligible for pensionary benefits. (Paras 13 to 15)**

ख. स्टेट बैंक ऑफ इंदौर (कर्मचारी) पेंशन विनियम, 1955, विनियमन 33 – पेंशन की हकदारी – विनियमन 33 के अंतर्गत, कर्मकार पेंशन का हकदार नहीं होगा यदि पदच्युति की शास्ति को अनिवार्य सेवानिवृत्ति से प्रतिस्थापित किया गया है जब तक कि कर्मकार अधिवार्षिकी पर पेंशन का हकदार न हो – अनिवार्य सेवानिवृत्ति की शास्ति का आदेश कर्मकार को पेंशन का हकदार नहीं बना सकता परंतु अधिकरण का आशय सुस्पष्ट है जिससे कि वह पेंशन लाभों के लिए हकदार हो सके – पेंशन का संदाय न किये जा सकने का मुद्दा न तो अधिकरण के समक्ष उठाया गया न ही अधिकरण द्वारा अवार्ड दिये जाने के समय परीक्षण किया गया – कर्मकार को पेंशन लाभों हेतु पात्र बनाने के लिए, शास्ति के बिंदु पर मामला अधिकरण को प्रतिप्रेषित किया गया।

Cases referred:

AIR 1974 SC 696, AIR 1988 SC 37, AIR 1996 SC 484, (1994) 2 SCC 537, AIR 1973 SC 1227.

R.C. Sinhal, for the Bank.

Vishwas Sharma, workman, present in person.

ORDER

The Order of the Court was delivered by : **HEMANT GUPTA, C.J. :-** These are writ petitions challenging the award dated 30.01.2015 passed by the Central Government Industrial Tribunal Cum Labour Court, Jabalpur. (for short "the Tribunal"). The Tribunal by the said award, substituted an order of punishment of dismissal to that of compulsory retirement.

2. The said award is challenged by the Bank in writ petition No.2625/2016 whereas writ petition No.1040/2016 is preferred by the workman.

3. The dispute relating to dismissal of the services of the workman in April, 1999 was referred for adjudication to the Tribunal. The services of the workman were dismissed after conducting regular enquiry. After an enquiry officer submitted report, show cause notice was served upon the workman and after considering the reply, punishment of dismissal was imposed.

4. Earlier, the Tribunal in its order dated 14.09.2010 returned a finding that the enquiry conducted against the workman is proper and legal. Still further, in the award impugned, the learned Tribunal affirmed the finding recorded against point No.1 i.e. whether the misconduct alleged against workman is proved from evidence in enquiry proceedings. Having returned such finding, on issue No.2 it held that the workman has completed about 15 years of service, therefore, the punishment of dismissal needs to be converted into compulsory retirement so as to enable the workman earn his pension.

5. Learned counsel for the Bank argued that the jurisdiction of the Tribunal in interfering with the order of punishment is limited. It cannot act as a Court of appeal and substitute an order of punishment from that dismissal to compulsory retirement. He relies upon the orders passed in the case of the *East India Hotels vs. Their Workmen and Ors* reported as AIR 1974 SC 696; *Christian Medical College Hospital Employees' Union and another vs. Christian Medical College Vellore Association & Ors* reported as AIR

1988 SC 37; *B.C Chaturvedi vs. Union of India* reported as AIR 1996 SC 484 and the order passed by the Hon'ble Supreme Court in the case of *State Bank of India and others vs. Samarendra Kishore Endow and another* reported as (1994) 2 SCC 537.

6. On the other hand, the workman who appeared in person stated that he had not been given benefit of pension though the award was announced way back on 30.01.2015.

7. We have heard learned counsel for the Bank and the workman in person. We find that after Section 11A was inserted in the Industrial Disputes Act, 1947 (for short 'the Act) on 15.12.1971, the Supreme Court has examined the scope of such provision in a judgment reported in *The workmen of M/s Firestone Tyre & Rubber Co. of India P.Ltd. vs. The management and others*, AIR 1973 SC 1227 . It held as under:-

> 30. This will be a convenient stage to consider the contents of Section 11A. To invoke Section 11A, it is necessary that an industrial dispute of the type mentioned therein should have been referred to an industrial Tribunal for adjudication. In the course of such adjudication, the Tribunal has to be satisfied that the order of discharge or dismissal was not justified. If it comes to such a conclusion, the Tribunal has to set aside the order and direct reinstatement of the workman on such terms as it thinks fit. The Tribunal has also power to give any other relief to the workman including the imposing of a lesser punishment having due regard to the circumstances. The proviso casts a duty on the Tribunal to rely only on the materials on record and prohibits it from taking any fresh evidence. Even a mere reading of the section, in our opinion, does indicate that a change in the law, as laid down by this Court has been effected. According to the workmen the entire law has been completely altered; whereas according to the employers, a very minor change has been effected giving power to the Tribunal only to alter the punishment, after having held that the misconduct is proved. That is, according to the employers, the Tribunal has a mere power to alter the punishment after it holds that the misconduct is proved. The workmen, on the other hand, claim that the law has been re-written.

37. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference under Section 11A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also hold that the order of discharge or dismissal is not justified because the alleged misconduct it self is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why, according to us, section 11A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points. Now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate upon the dispute referred to it in which and employer relies on the findings recorded by him in a domestic enquirer. Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognized in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by Section 11A.

38. Another change that has been effected by Section 11A is the power conferred on a Tribunal to alter the punishment imposed by an employer. If the Tribunal comes to the conclusion that the misconduct is established, either by the domestic enquiry accepted by it or by the evidence adduced before it for the first time, the Tribunal originally had no power to interfere with the punishment imposed by the management. Once the misconduct is proved, the Tribunal had to sustain the order of punishment unless it was harsh indicating victimization. Under S. 11A, though the Tribunal may hold that the misconduct is proved, nevertheless it may be of the opinion that the order of discharge or dismissal for the said misconduct

> is not justified. In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman only lesser punishment instead. The power to interfere with the punishment and alter the same has been now conferred on the Tribunal by S. 11A.

8. On the other hand, the judgment referred by the learned counsel for the Bank in the case of the *East India Hotels* (supra) pertains to an incident which occurred on 24th November, 1969 and an industrial dispute was raised and referred by the Govt. on 24th Nov, 1970. That was a case prior to insertion of section 11A of the Act which has been, in fact, noticed by the Court in para-5 of the order which reads as under:-

> 5. This appeal is by special leave against the award of the Tribunal. It is not denied that the Tribunal was in error in applying Section 11A of the Act to this case, because the complaint, the enquiry, the report and the reference were all prior to the coming into operation of this section on December 15, 1971. This Court held in The Workmen of Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. v. The management and Ors. (1) (1973) 1 Lab. LJ 278 (AIR 1973 SC 1227) that Section 11A has no retrospective operation as it not only deals with procedural matters, but also has the effect of altering the law laid down by this Court in this respect by abridging the rights of the employer inasmuch as it gives power to the Tribunal for the first time to differ both on a finding of misconduct arrived at by an employer as well as with the punishment imposed by it. ..... On the other hand, the Tribunal proceeded on the basis that the enquiry was not vitiated, but it had power under Section 11A to arrive at a different conclusion and award a different punishment. That apart, even the evidence justified the conclusion arrived at by the Enquiry Officer.

9. In the judgment reported as *Christian Medical College Hospital Employees' Union* (supra), it has been held that Section 11A confers power on the Industrial Tribunal or the Labour Court to substitute a lesser punishment in lieu of the order of discharge or dismissal passed by the management but it cannot be considered as conferring an arbitrary power on the Industrial Tribunal

or the Labour Court. In the present case, learned Tribunal has recorded a finding that having rendered 15 years of service, the punishment of dismissal is not justified, therefore, it is not an arbitrary exercise of powers. The judgments in the case of *B.C Chaturvedi's* case (Supra) does not relate to the proceedings before the Industrial Tribunal. The scope of interference in proceedings under Article 226 of the Constitution or in proceedings before the civil Court are materially different than the power conferred on the Labour Court or Industrial Tribunal under Section 11A of the Act. Under section 11A of the Act, the Tribunal has been conferred power to re-appreciate the evidence and to examine as to whether the finding of misconduct returned by the employers is fair and reasonable and even if such finding is in favour of the employer, the Tribunal has been conferred power to interfere in the order of punishment as well.

10. In view of the above, we find that the judgment in the of *B.C Chaturvedi's* case (Supra) is of no avail to the argument advanced by the learned for the Bank. In *Samrendra Kishore's* case (supra), the disciplinary proceedings were challenged in a writ petition. While considering the scope of interference while exercising the power of judicial review under Article 226 of the Constitution, the Court held that it is not the function of the High Court in a writ petition under Article 226 of the Constitution to review the evidence and arrive at an independent finding of fact on the issue. But the present case is not of invoking the jurisdiction of this Court under Article 226 of the Constitution but invocation of jurisdiction of the Tribunal under Section 11A of the Act. As mentioned in the preceding paragraphs, the Tribunal has got the power to re-appreciate the evidence and also interfere on the quantum of punishment. This jurisdiction is not vested upon the Writ Court or with the Civil Court.

11. Learned counsel for the Bank raised another argument that in terms of the State Bank of Indore (Employees') Pension Regulation, 1995 (for short "the Regulations"), the workman would not be entitled to pension if an order of punishment has been substituted to compulsory retirement. The reliance is placed upon Regulation 33 which reads as under:-

> 33.Compulsory retirement pension:-
>
> (i) An employee compulsorily retired from service as a penalty on the 1st day of November, 1993 in terms of

Service Regulations or Settlement by the authority higher than the authority competent to impose such penalty may be granted pension at a rate not less than two-thirds and not more than full pension admissible to him on the date of his compulsory retirement if otherwise he was entitled to such pension on superannuation on that date.

Whenever the Competent Authority passes an order (whether original, appellate or in exercise of power of review) awarding pension at a rate less than the full pension admissible under these regulations, the Board of Directors or its Executive Committee shall be consulted before such order is passed.

A pension granted or awarded under sub-regulation (1) or, as the case may be, under sub-regulation (2), shall not be less than the amount of rupees three hundred and seventy five per mensem.

12. He thus contended that the workman has completed only 15 years of service and has not attained the age of superannuation, therefore, on account of imposition of penalty of compulsory retirement, therefore, he will not be entitled to pension. On the other hand, the workman argued that he has completed qualifying service of 10 years, therefore, he would be entitled to pension having rendered qualifying service in terms of Regulation 14 of the Regulations.

13. We find merit in the argument raised by the counsel for the Bank that if a punishment of compulsory retirement is imposed, that will not entitle the workman to pension unless he was entitled to pension on superannuation. Since the workman was not to superannuate in the year 1999, therefore, an order of punishment of compulsory retirement may not entitle him for the benefit of pension but, the intention of the Tribunal is categorical when an order of punishment was substituted so as to entitle him to the pensionary benefits. The pension cannot be paid was neither raised before the Tribunal nor examined at the time of rendering its award by the Tribunal, therefore, we modify the impugned award passed by the Tribunal substituting the order of punishment of dismissal to that of compulsory retirement and remit the matter to the Tribunal to consider as to which other punishment can be imposed so as to make the workman eligible for pensionary benefits or such other punishment, which the

Tribunal may consider appropriate in the facts of the case.

14. In view of the above, the writ petition filed by the Bank is allowed partly. Matter is remit back to the Tribunal for fresh decision on the quantum of punishment.

15. Parties through their counsel are directed to appear before the Tribunal on 19.06.2017. The writ petition filed by the workman also stands disposed of in the light of the aforesaid order.

Order accordingly.

I.L.R. [2017] M.P., 885
APPELLATE CIVIL
Before Mr. Justice Alok Verma
M.A. No. 482/2016 (Indore) decided on 21 September, 2016

SEVANTIBAI & ors. ...Appellants
Vs.
BABUSINGH & anr. ...Respondents

Civil Procedure Code (5 of 1908), Order 43 Rule 1 & 2 **– Appeal against order of setting aside judgment and decree and remanding the matter for retrial – In appeal respondent filed two applications, one under Order 6 Rule 17 C.P.C., amendment sought, that u/S 169(2) MPLRC 1959, respondent No. 1 got bhumiswami rights after remaining possession for two years and other application under Order 41 Rule 27 C.P.C. for taking documents on record to show possession over the property, appellate Court allowed both applications – Held – Possession of respondent No. 1 was undisputed, he raised plea of adverse possession also according to appellant the land was given to respondent No. 1 on Ardhbatai, she claimed possession u/S 168 MPLRC, therefore this question can be decided on the basis of material available on record – Certified copy of Khasra can be admitted without any evidence and read in evidence – Merely on producing some additional document, which was already in possession during pendencey of suit, matter should not be remanded to trial Court – Order of remand set aside, appeal allowed. (Paras 5, 10 & 11)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1 व 2 – निर्णय व डिक्री अपास्त किये जाने एवं पुनःविचारण हेतु मामला प्रतिप्रेषित करने के आदेश के

विरूद्ध अपील – अपील में प्रत्यर्थी ने दो आवेदन प्रस्तुत किये, एक, आदेश 6 नियम 17 सि.प्र.सं. के अंतर्गत संशोधन चाहा गया कि प्रत्यर्थी क्र. 1 को म.प्र. भू–राजस्व संहिता, 1959 की धारा 169(2) के अंतर्गत, दो वर्ष से कब्जे में रहने के पश्चात् भूमिस्वामी अधिकार प्राप्त हुए तथा अन्य आवेदन, आदेश 41 नियम 27 सि.प्र.सं. के अंतर्गत, संपत्ति पर कब्जा दर्शाने के लिए दस्तावेज अभिलेख पर लेने हेतु, अपीली न्यायालय ने दोनों आवेदन मंजूर किये – अभिनिर्धारित – प्रत्यर्थी क्र. 1 का कब्जा अविवादित था, उसने प्रतिकूल कब्जे का अभिवाक् भी उठाया, अपीलार्थी के अनुसार प्रत्यर्थी क्र. 1 को अर्धबटाई पर भूमि दी गई थी, उसने म.प्र. भू–राजस्व संहिता की धारा 168 के अंतर्गत कब्जे का दावा किया, इसलिए इस प्रश्न का विनिश्चय अभिलेख पर उपलब्ध सामग्री के आधार पर किया जा सकता है – खसरे की प्रमाणित प्रति को बिना किसी साक्ष्य के ग्रहण किया जा सकता है और साक्ष्य में पढ़ा जा सकता है – मात्र कुछ अतिरिक्त दस्तावेज प्रस्तुत किये जाने पर, जो वाद के लंबित रहने के दौरान पहले से कब्जे में था, मामला विचारण न्यायालय को प्रतिप्रेषित नहीं किया जाना चाहिए – प्रतिप्रेषण का आदेश अपास्त, अपील मंजूर।

Cases referred:

2009 (1) MPLJ 621, (2002) 2 SCC 686, 2013 (4) MPLJ 135, (2008) 8 SCC 485, 2010 (5) MPHT 254.

Siraj Khan, for the appellant.
Harshad Wadnerkar, for the respondent No. 1.

(Supplied: Paragraph numbers)

ORDER

ALOK VERMA, J. :- This Miscellaneous Appeal is directed against the order passed by learned Additional District Judge, Manawar, District-Dhar in civil suit appeal No.4-A/13 whereby learned Additional Sessions Judge set-aside the judgement and decree passed by learned Civil Judge Class-II, Manawar, District-Dhar in civil suit No.2-A/11 dated 22.12.2012 and remanded the matter back to the trial court for retrial.

2. The admitted facts are that deceased-Amar Singh who is husband of appellant No.1 Sevantibai and father of appellants No.2 to 6 and brother-in-law of respondent No.1 Babusingh. Amar Singh died in the year 1997. It is also admitted that suit property bearing survey No.238 area measuring 1.99 hectare situated at village Kawathi is recorded in the name of deceased-Amar Singh. Earlier the suit property belonged to one Rupabai wife of Umrao Singh. Respondent No.1 Babusingh filed a suit for declaration and permanent injunction

against the appellants averting therein that the deceased-Amar Singh being closely related to him wanted to purchase the suit property from Rupabai but he was not having necessary resources and amount for payment of price of the land. Accordingly, he requested respondent-Babusingh to make payment on his behalf to Rupabai and it was agreed between them that the whole amount would be refunded back to him within two years and if he failed to return the amount, respondent-Babusingh would become absolute owner of the land. Under these conditions, a sale deed was executed on 11.01.1988. After execution of sale deed, an agreement was also executed on 23.02.1988 in which it was mentioned that respondent-Babusingh came in possession of the land immediately after execution of sale deed on 11.01.1988 and he was cultivating the land.

3. Subsequently, deceased-Amar Singh could not refund the amount within the stipulated period of two years, and therefore, after his death in the year 1997, a suit was filed for declaration and permanent injunction, in which, the ownership of the land was claimed on the basis of adverse possession also.

4. The appellants filed a written statement stating therein that the facts stated by the respondent-Babusingh were all incorrect. After death of deceased-Amar Singh in year 1997 being the widow, she gave the land on ardhbatai to respondent-Babusingh, who took the original sale deed being closely related to deceased-Amar Singh. Appellant No.1 gave him original papers in good faith. Respondent No.1 stopped paying profit from the year 2004, and therefore, they also filed a counter claim in that suit. Learned trial court gave a finding and did not found the facts stated by respondent as proved. However, counter claim was allowed and the trial court gave a finding that the land was given on ardhbatai by the appellant to respondent No.1.

5. Aggrieved by these findings, the appeal was filed by the respondent in which he also filed two applications one under Order 6 Rule 17 of C.P.C. and another under Order 41 Rule 27 of C.P.C. By application under Order 6 Rule 17 of C.P.C., - an amendment was sought to be made that under section 169(2) of M.P. Land Revenue Code, respondent No.1 acquired rights of Bhumi Swami after remaining in possession for two years. Learned lower appellate court opined that whether under section 169(2) of M.P. Land Revenue Code, respondent No.1 acquired Bhumi Swami or not is a mixed question of law and fact. Similarly, by application under Order 41 Rule 27 of C.P.C. various documents to show possession over the suit property like

certified copy of Khasra, electricity bill and receipt for payment of land revenue were sought to be brought on record.

6. Learned lower court allowed both the applications. The learned lower court further opined that issue No.4 was disposed of merely in eight lines and detailed appreciation of evidence was not made by the trial court, and on these three grounds, matter was remanded back for retrial.

7. Counsel for the appellants places reliance on judgement of Co-ordinate Bench of this Court in case of *Arvind S/o Ganga Vishnu (Dr.) Vs. Mannalal S/o Bherulal Keer,* reported at 2009(1) M.P.L.J. 621, in which, Co-ordinate Bench places reliance on observations made by Hon'ble Apex Court in case of *P. Purushottam Reddy and another Vs. Pratap Steels Ltd.*, reported at (2002) 2 SCC 686 and held that only when case is made out for retrial under the provisions of rule 23 and 23-A of rule 41 C.P.C., the matter can be remanded back for the trial. On this point only, the appellant has cited judgement of Co-ordinate Bench of this court in case of *Pushpa Devi Vs. Harvilas & others* reported at 2013(4) MPLJ 135, and judgement of Hon'ble Apex Court in case of *Municipal Corporation, Hydrabad Vs. Sunder Singh* reported at (2008) 8 SCC 485.

8. While the respondent relies on judgement passed by Co-ordinate Bench of this court in case of *Gendalal & others Vs. Jasoda Bai & another* reported at 2010(5) M.P.H.T. 254, in which, it was held that if a lessee is in contravention of provisions of section 168 of M.P. Land Revenue Code, the lessee acquires status of occupancy tenant by virtue of section 169 of the Code.

9. In this appeal, however, it is to be seen whether the plea raised by the respondent of acquiring status of occupancy tenant under section 169(2) of M.P. Land Revenue Code and also in light of document produced by him and whether remand of the case and retrial is warranted or not.

10. After taking into consideration the arguments raised by counsel for the appellants as well as the counsel for the respondent, this court is of considered opinion that remand in this case is not required. Respondent No.1 being in possession of the suit property is undisputed. According to respondent No.1, he came in possession of the land after registered sale deed in favour of deceased-Amar Singh in the year 1988 itself, and therefore, he also raised plea of adverse possession. However, according to appellant, the land was

given to respondent No.1 on ardhbatai as she was the only widow of deceased-Amar Singh. She claimed possession of the land under the provisions of section 168 of M.P. Land Revenue Code being widow, she can gave her land on lease for a period exceeding one year, and therefore, respondent No.1 does not get benefit of provision of section 169(2) of the Code.

11. In opinion of this court, this question can be decided on the basis of material available on record. Also the certified copy of Khasra can be admitted without any evidence and read in evidence, and therefore, merely by producing some additional document which was already in his possession during pendency of the suit matter should not have been remanded back by the trial court.

12. In this view of the matter, the order passed by learned Appellate Court below is liable to be set aside and this appeal deserves to be allowed.

13. Accordingly, the appeal is allowed.

14. The impugned order passed by learned Appellate Court below dated 29.01.2016 is set-aside judgement and decree passed by trial court is restored.

15. The appellate court is directed to hear the case on merit and decide according to law.

Appeal allowed.

I.L.R. [2017] M.P., 889
APPELLATE CIVIL
Before Mr. Justice Vivek Agarwal
S.A. No. 551/2010 (Gwalior) decided on 8 November, 2016

GAJRAJ SINGH ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

A. Constitution – Article 300A – **Protection thereof – When can be claimed – Held – To claim protection of the Article, onus is on the person claiming to show that the land in question is his property and he had acquired Bhumiswami rights. (Para 13)**

क. संविधान – अनुच्छेद 300ए – उसका संरक्षण – कब दावा किया जा सकता है – अभिनिर्धारित – अनुच्छेद के संरक्षण का दावा करने हेतु, दावा करने

वाले व्यक्ति पर यह दर्शाने का भार है कि प्रश्नगत भूमि उसकी संपत्ति है तथा उसने भूमिस्वामी के अधिकार अर्जित कर लिये थे।

B. Forest Act (16 of 1927), Section 6 – **Personal notice to the possessor – Whether required – Held – Section 6 only requires that Forest Settlement Officer shall publish in local vernacular in every town and village in the neighbourhood of the land comprised therein, a proclamation specifying as nearly as possible, the situation and limits of the proposed forest; explaining the consequences which will ensue on the reservation of such forest and fixing a period not less than three months from the date of such proclamation, and requiring every person claiming any right u/S 4 or 5 either to present to Forest Settlement Officer a written notice specifying or to appear before him and state the nature of such right and the amount and particulars of the compensation claimed in respect thereof – There is no provision of issuing personal notice to the possessor of the land. (Para 8)**

ख. वन अधिनियम (1927 का 16), धारा 6 – कब्जाधारक को व्यक्तिगत नोटिस – क्या अपेक्षित है – अभिनिर्धारित – धारा 6 में केवल यह अपेक्षित है कि वन व्यवस्थापन अधिकारी, समाविष्ट भूमि के आस–पास के प्रत्येक नगर तथा ग्राम में, प्रस्तावित वन की स्थिति एवं सीमाओं को यथा संभव विनिर्दिष्टित करते हुए, उक्त वन को आरक्षित करने पर उत्पन्न परिणामों को स्पष्ट करते हुए उद्घोषणा का, तथा उक्त उद्घोषणा से कम से कम तीन माह की अवधि नियत करते हुए धारा 4 या 5 के अंतर्गत अधिकार का दावा करने वाले प्रत्येक व्यक्ति से वन व्यवस्थापन अधिकारी को उक्त अधिकार का स्वरूप और उसके संबंध में किये गये प्रतिकर के दावे की राशि एवं विशिष्टियों का कथन या तो लिखित नोटिस में विनिर्दिष्ट करते हुए या उसके समक्ष उपस्थित होकर प्रस्तुत करने की अपेक्षा करते हुए, स्थानीय भाषा में प्रकाशन करेगा – भूमि पर कब्जा रखने वाले को व्यक्तिगत नोटिस जारी किये जाने का कोई उपबंध नहीं है।

C. Madhya Bharat Zamindari Abolition Act, (13 of 1951), Section 4/37-38 – **Vesting of land in State – Held – Beed land got vested in the State automatically – Onus is on the plaintiff to prove that the land in question was not a Beed land, but Khud-kasht land which was recorded as Beed land – It is also not the case that Khud-kasht land has been given on lease – Thus the ratio of Devi Singh, Gorabai and Gordhandas case is not applicable in present case. (Para 5 & 6)**

ग. मध्य भारत जमीनदारी उन्मूलन अधिनियम, (1951 का 13), धारा

4/37–38 – भूमि का राज्य में निहित किया जाना – अभिनिर्धारित – बीड़ भूमि राज्य में स्वतः निहित हो गई – यह साबित करने का भार वादी पर है कि प्रश्नगत भूमि बीड़ भूमि नहीं थी, बल्कि खुदकाश्त भूमि है जो कि बीड़ भूमि के रूप में अभिलिखित है – प्रकरण यह भी नहीं है कि खुदकाश्त भूमि पट्टे पर दी गई है – इसलिए देवी सिंह, गोरा बाई एवं गोरधनदास प्रकरण के निर्णय आधार वर्तमान प्रकरण में लागू नहीं होंगे।

Cases referred:

2007 RN 107, 2002 RN 1 (SC), 2004 RN 201 (SC), (2014) 3 SCC 430, (2009) 4 SCC 299, 1996 AIR SCW 2972.

B. Raj Pandey, for the appellant.
Nidhi Patankar, G.A. for the respondent No. 1/State.

JUDGMENT

VIVEK AGARWAL, J. :- This second appeal has been filed under Section 100 CPC arising out of the judgment and decree dated 27.9.2010 passed by the learned District Judge, Vidisha, in Civil Appeal No.25-A/2010, whereby the judgment and decree dated 29.3.2010 passed by the IV Civil Judge, Class II, Vidisha, in civil suit No.75-A/2009 has been affirmed.

2. According to the appellant, his forefathers had obtained ownership rights in relation to the land contained in survey No.47 measuring 2.257 hectares situated in village Mehdon,Tahsil Gyaraspur Distt. Vidisha and as such his grandfather Tarwar Singh was declared to be Bhumiswami by an order dated 21.2.1969 by the Sub Divisional Officer, Vidisha, therefore, notification declaring the said land as reserved forest land could not have effect of affecting the title which has already vested in the plaintiff/appellant. According to the learned counsel for the appellant, since his grand-father was a Pakka Krishak at the time of enactment of Zamindari Abolition Act, 1951 as defined in Section 2(e) of the said Act, therefore, Bhumiswami rights conferred on the appellant have been arbitrarily disturbed in the light of the notification dated July 25th 1986 declaring the said land as reserved forest. It is also submitted that the notification does not mention name of his village correctly, and therefore, such notification is not binding on the appellant. It is further submitted that in terms of the provisions contained in Section 36 of the Indian Forest Act, 1927, service of notice was required to be effected personally on the plaintiff and in absence of such service, findings recorded

by the Courts below are perverse. Learned counsel for the appellant has also submitted that the first appellate Court has not adverted to the merits of the case and has rejected the first appeal on the ground of non-maintainability of the civil suit in terms of the provisions contained in Section 20 of the Indian Forest Act, 1927.

3. In support of the contention that appellant had become Bhumiswami, appellant has placed reliance on the judgment rendered by this Court in the case of *Devi Singh & Ors. v. State of M.P. & Ors.*, as reported in 2007 RN 107 wherein it is held that in terms of Section 2 (c) of the Zamindari Abolition Act, 1951 'Khudkasht" land of Zamindar recorded as "Beed" is to be treated as Khudkasht and not Beed. Similarly, reliance has been placed on the judgment in the case of *Gordhan Das Vs. Phirkan and others* as reported in 2002 RN I (SC) wherein the Supreme Court has held that defendants possession since before commencement of the Zamindari Abolition Act if proved, then such defendant acquires the status of Pakka tenant. Appellant has also placed reliance on the judgment of the Supreme Court in the case of *Gorabai (Smt.) and others vs. Ummed Singh (Dead) by LRs. and others* as reported in 2004 RN 201 (SC) wherein land recorded as Khudkast in 1942 when it was given to tenant for 8 years, period of lease expired before the date of vesting, land in possession of the tenant as trespasser on the date of vesting, ex proprietor taking action for restoration of possession, he is entitled to have the possession as ex proprietor and becomes tenant of government. By placing reliance on these judgments, learned counsel for the appellant has tried to bring home the issue that since his grand-father was a Pakka Krishak, therefore, he by virtue of possession, had become Bhumiswami and no interference could have been made in the Bhumiswami rights which had already materialized in favour of the plaintiff by operation of notification dated 25th July, 1986.

4. Learned trial Court has clearly noted that Zamindari Abolition Act was notified in the Gazette on 25th June, 1951 and as per that Act Pakka Krishan (sic:Krishak) has been defined in Section 2(e) as under :-

> "2(e) "Pacca tenant" means Pacca tenant as defined in clause (vii) of Section 54 of the United State of Gwalior, Indore and Malwa (Madhya Bharat) Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007"

Similarly, Section 54 (vii) of the United State of Gwalior, Indore and Malwa (Madhya Bharat) Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 defines Pacca tenant as under :-

> "(vii) Pakka tenant-means a tenant who has been or whose predecessor in interest had been lawfully recorded in respect of his holding as a "Ryot Pattedar", "Mamuli Maurusi", "Gair Maurusi" and "Pukhta Maurusi" when this Act comes into force or who may in future be duly recognized as such by a competent authority."

5. Zamindari Abolition Act defines Khudkasht in Section 2(c) which reads as under :-

> "2(c) "Khd-kasht" means land cultivated by the Zamindar himself or through employees or hired labourers and includes sir land"

Section 3(1) of the Zamindari Abolition Act provides as under :-

> **"3. Vesting of proprietary rights in the State.-**(1) Save as otherwise provided in this Act and subject to the provisions of Section 8, on and from a date to be specified by a notification by the Government in this behalf (hereinafter referred to as the date of vesting) all proprietary rights in a village, muhal, land, chak or block in Madhya Bharat vesting in a proprietor of such village, muhal, land, chak or block as the case may be, or in a person having interest in such proprietary right through the proprietor shall pass from such proprietor of such other person, to and vest in the State free of all encumbrances."

Similarly, Section 4(1)(a) of the Zamindari Abolition Act reads as under :-

> **"4. Consequence by the vesting of an estate in the State.-** (1) Save as otherwise provided in this Act when the notification under Section 3 in respect of any area has been published in the Gazette, then, notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force, the consequences as hereinafter set forth shall from the beginning of the date specified in such notification (hereinafter referred to as the date of vesting) ensue, namely:-

(a) all rights, title and interest of the proprietor in such area, including land (cultivable, barren or Bir), forest, trees, fisheries, wells (other than private wells), tanks, ponds, water channels, ferries, pathways village-sites, hats, and bazars and mela-grounds and in all sub-soil, including rights, if any, in mines and minerals, whether being worked or not shall cease and be vested in the State free from all encumbrances."

Section 37 and 38 of the Zamindari Abolition Act reads as under :-

"37 Conferral of pacca tenancy rights on proprietor.- (1) Every proprietor who is divested of his proprietary rights in an estate, chak, block or Muhal shall, with effect from this date of vesting, be a pacca tenant of the Khud-kasht land in his possession and the land revenue payable by him shall be determined at the rate fixed by the current settlement for the same kind of land.

(2) If there are more persons than one having interest in land held as Khud-kasht immediately before the date of vesting, any such person may apply for a partition of his share in the land to the Tahsildar who shall proceed according to the provisions of Section 69 of Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 and in case of partition shall rateably apportion the assessed rent:

Provided that no such partition shall be made if any question of title is raised until such question has been decided by a competent Court.

Explanation.- For the purposes of the aforesaid proviso, the claim by any proprietor that he holds any land in exclusive ownership or that he had acquired any Khud-kasht land exclusively for himself shall be deemed to be a question of title.

(3) If a Tahsildar is of opinion that for preventing multiplicity of proceedings, or for any other reason it would be just and convenient to join as parties all persons who held

shares in the estate or Muhal before the date of vesting he may order all such persons to be joined as parties.

38. Conferral of pacca tenancy right on tenant and Sub-tenants. -(1) Subject to the provisions of this section, every tenant of a proprietor shall be deemed to be a pacca tenant of the land comprised in his holding from the date of vesting.

(2) Every sub-tenant or tenant of a sub-tenant who deposits with the Tahsildar within the period specified in sub-section (3) and (4) the following amount to be paid to proprietor or tenant or sub-tenant as his case may be, shall be deemed to be a pacca tenant of the land comprised in his holding. Till amount is deposited, his former status shall continue. The right of becoming a pacca tenant by depositing money shall firstly be that of the tenant of the sub-tenant, if any, and if he fails to deposit money shall be that of the sub-tenant."

Therefore, it is apparent that plaintiff had filed Ex.P/1, copy of the Khasra for the year 2006-07, in which his name is recorded as Kabjedar. Similarly, Ex.P/2 is the order of SDO dated 21st February, 1969 holding that on abolition of Zamindari Tarwar Singh become Pakka Krishak, but there is no document on record to show that plaintiff or his grand-father was in possession of the suit land as Khudkast or Pakka Krishak at the time of enforcement of Zamindari Abolition Act giving them rights of Bhumiswami. It is also apparent from the records that suit land has been shown as Beed land, and therefore, such land got vested in the State automatically. The judgment in the case of *Devi Singh* (supra) is distinguishable inasmuch as suit land does not reflect that the land in question was Khudkasht land of Zamindar which was recorded as Beed. In absence of any such documentary evidence to show that the land in question was Khudkast land of Zamindari, same cannot be presumed to be Khudkast land, and therefore, onus was on the plaintiff to prove that land in question was not a Beed land, but a Khudkast land which was recorded as Beed land. Since that burden has not been discharged, ratio of that case is not in favour of the plaintiff. Similarly, ratio in the case of *Gorabai* (supra) is also not applicable to the facts of the present case inasmuch as in terms of the provisions contained in Section 4(2) proprietor of a land has been held to continue to remain in possession of the Khudkasht land if it was so recorded in the annual

village papers in any of the years before the date of vesting. In the present case, it is not the case of the plaintiff that his Khudkasht land was given on lease, and therefore, after expiry of the lease, land stood vested in him as a proprietor. In absence of such case being made, the ratio of the judgment of *Gorabai* (supra) is also not applicable to the facts and circumstances of the case.

6. In the case of *Gordhan Das* (supra), the issue which has been decided is that in terms of the provisions contained in Section 38(1) if a party is able to show his possession before the commencement of the Zamindari Abolition Act, then such party acquires status of Pakka tenant. In the present case, appellant has failed to discharge his burden to show his possession prior to 25th -June, 1951 when Zamindari Abolition Act, 1951 came into being. Thus, ratio of this judgment is also not applicable to the facts and circumstances of the present case.

7. At this stage, it will be proper to consider other arguments advanced by the learned counsel for the appellant, namely provision of Section 36 of the Indian Forest Act, 1927 requires service of notice personally on the possessor of the land. It is important to refer to the provisions contained in Section 36 of the Indian Forest Act, 1927. Section 36 deals with power to assume management of forests. It reads as under -

> **36. Power to assume management of forests.**-(1) In case of neglect of, or wilful disobedience to, any regulation or prohibition under section 35, or if the purposes of any work to be constructed under that section so require, the State Government may, after notice in writing to the owner of such forest or land and after considering his objections, if any, place the same under the control of a Forest-officer, and may declare that all or any of the provisions of this Act relating to reserved forests shall apply to such forest or land.

8. In the opinion of this Court, so also as is apparent from the notification Ex.D/2, said notification was issued under the provisions of Section 4 of the Forest Act. Section 4 of the Forest Act deals with notification by the State Government which reads as under :-

> "**4.Notification by State Government.**-(1) Whenever it has been decided to constitute any land a reserved forest, the State

Government shall issue a notification in the official Gazette-

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land; and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits or in or over any forest produce, and to deal with the same as provided in this Chapter.

Explanation.-For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries."

Section 6 provides for proclamation by Forest Settlement-officer and Section 7 provides for inquiry by Forest Settlement -officer. Section 9 provides for extinction of rights in respect of which no claim has been preferred under Section 6 and of the existence of which no knowledge has been acquired by inquiry under Section 7, shall be extinguished, unless before the notification under section 20 is published, the person claiming them satisfies the Forest Settlement-officer that he had sufficient cause for not preferring such claim within, the period fixed under section 6. Thus, it is apparent that there is no provision for personal notice and Section 6 only requires that Forest Settlement-officer shall publish in the local vernacular in every town and village in the neighbourhood of the land comprised therein a proclamation specifying, as nearly as possible, the situation and limits of the proposed forest, explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in section 4 or section 5 within such period either to present to the Forest Settlement-officer a written notice specifying or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof.

9. In view of the aforesaid, clearly the provisions of Section 36 of the

Indian Forest Act are not applicable and reliance placed by the appellant on Section 36 is also misconceived.

10. At this stage, learned counsel for the appellant has placed reliance on the judgment of Supreme Court in the case of *Godrej and Boyce Manufacturing Company Ltd. and Anr. Vs. State of Maharashtra and Ors.* as reported in (2014) 3 SCC 430 and has drawn attention of this Court to paragraph 55 and 57 of the said judgment. This judgment pertains to the provisions pertaining to management and taking over of Forest Act which is clearly not applicable to the facts and circumstances of the present case.

11. Appellant has also placed reliance on the judgment of the Supreme Court in the case of *Rajasthan State Road Transport Corporation and another Vs. Bal Mukund Bairwa* as reported in (2009) 4 SCC 299. It is the contention of the appellant that if there was breach of fundamental procedure as prescribed under Section 36 of the Indian Forest Act, then question in regard to the jurisdiction of the civil court must therefore be addressed having regard to the fact as to which rights or obligations are sought to be involved for the purpose of invoking or neglecting the jurisdiction of a civil court. Placing reliance on this judgment, learned counsel has tried to impress upon this Court that learned first appellate Court has wrongly referred to the provisions of Section 20 of the Indian Forest Act, 1927. But the fact of the matter is that first appellate Court has adverted to both the merits of the claim of the appellant, so also has adverted to the provisions of Section 20 of the Indian Forest Act. In the case of *State of U.P. Vs. Deputy Director of Consolidation and others* as reported in 1996 AIR SCW 2972 it has been held that once notification under Section 20 of the Indian Forest Act declaring a land as reserved forest is published, then rights in the said land claimed by a person come to an end and are no longer available. In view of the aforesaid judgment, learned first appellate Court has held that any right in the suit land in favour of the appellant stood extinguished. In view of the ratio of the aforesaid judgment, learned first appeallate Court has adverted to the provisions of Section 9 CPC and has held that since Indian Forest Act, 1927 is a complete code in itself and contains elaborate procedure for declaring and notifying reserved forest and that notification is binding as decree of civil court, the jurisdiction of the civil court was impliedly barred.

12. Thus, there are two concurrent findings which remained unrebutted namely plaintiff could not prove his ownership on the suit land by adducing

any evidence to show that he had acquired Bhumiswami rights on abolition of Zamindari and coming into force of the Zamindari Abolition Act, 1951, and secondly appellant has failed to prove that he had taken steps as are envisaged under the provisions of Indian Forest Act, 1927 consequent to issuance of notification under Section 4. Therefore, the appellant has failed to prove his Bhumiswami rights over the land and has also not been able to establish that in the event of his failure to take steps as provided under the Forest Act how help of Section 9 CPC be taken when there is express bar.

13. Article 300 A of the Constitution of India provides that persons are not be deprived of property save by authorities of law. It reads no person shall be deprived of his property save by authority of law. To attract provisions of this Article, onus was on the appellant to show that land in question was his property and he had acquired Bhumiswami rights. As has been discussed by the learned trial Court and first appellate Court the plaintiff could not prove the land to be his own property, therefore, provisions of Article 300 A of the Constitution cannot be resorted to.

14. In view of the aforesaid discussion, no substantial question of law emerges for decision in the present second appeal. Consequently, this appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2017] M.P., 899
APPELLATE CIVIL
Before Mr. Justice Vijay Kumar Shukla
S.A. No. 381/2015 (Jabalpur) decided on 16 December, 2016

RAMSANEHI & ors. ...Appellants
Vs.
MST. RAJJUWA & anr. ...Respondents

Civil Law – Adverse Possession – **Appellants/plaintiffs filed suit for declaration of title on the basis of adverse possession and for permanent injunction – Concurrent findings of fact – Second Appeal – Held – No declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword as per the dictum of Apex Court laid down in Gurudwara Sahib's case reported in (2014) 1 SCC 669 – No Substantial question of law**

involved – Appeal dismissed. **(Paras 6 to 9)**

सिविल विधि – प्रतिकूल कब्जा – अपीलार्थीगण/वादीगण ने प्रतिकूल कब्जा के आधार पर स्वत्व की घोषणा एवं स्थायी व्यादेश हेतु वाद प्रस्तुत किया – तथ्य के समवर्ती निष्कर्ष – द्वितीय अपील – अभिनिर्धारित – प्रतिकूल कब्जे के आधार पर कोई घोषणा नहीं चाही जा सकती, जहाँ तक कि (2014) 1 SCC 669 में प्रकाशित गुरूद्वारा साहेब के प्रकरण में सर्वोच्च न्यायालय के आदेश के अनुसार प्रतिकूल कब्जे का प्रयोग ढाल के रूप में किया जा सकता है, तलवार के रूप में नहीं – विधि का कोई सारभूत प्रश्न अंतर्ग्रस्त नहीं – अपील खारिज।

Case referred:

(2014) 1 SCC 669.

Atul Anand Awasthi, for the appellant.
Deepak Awasthi, G.A. for the respondent.

ORDER

VIJAY KUMAR SHUKLA, J. :- The present appeal is filed under Section 100 (wrongly mentioned under Section 96 in the cause title) of Civil Procedure Code challenging the judgment and decree dated 03.03.2015 passed by the Upper District Judge, Sidhi to the Court of 1st Additional District Judge, Sidhi affirming the judgment and decree dated 08.09.2014 passed by the 4th Civil Judge Class-II dismissing the suit filed by the appellants/plaintiffs for declaration of the entries in the revenue record infavour of the defendant no.1 is null and void and also to grant permanent injunction.

2. The brief facts of the case are that the appellants filed a suit for declaration and injunction on the ground that the ancestors of respondent no.1/defendant no.1 had gifted certain property to the ancestors of the appellants/plaintiffs more than 50 years back and according to him the defendant's predecessors had relinquished their rights over the property. He has submitted that the ancestors of the plaintiffs constructed their house on the land gifted by the predecessors of the defendant no.1 and thereafter, they had been enjoying the said property. However, in the revenue records the name of defendant no.1 continued to be recorded in the records of the rights and his name was mutated. The appellant was asserted that they remain in the possession of the suit property since long. Claiming adverse possession the suit was filed.

3. Defendant no.1 denied the claim of the plaintiffs and submitted that he is sole *Bhumi Swami* and possession holder of the said land. He further pleaded that the disputed land was never transferred by his ancestors to the ancestors of the plaintiffs and there was no adverse possession or any relinquishment of right infavour of the plaintiffs. Considering the facts and the records, the trial Court vide judgment and decree dated 08.09.2014 dismissed the suit.

4. The trial Court recorded a finding that the plaintiffs could not perfected his title by way of adverse possession on the disputed land and the possession of the plaintiffs was also not found proved. Further the trial Court recorded a finding that there was no interference in the possession of the plaintiffs by the defendant no.1.

5. These findings were challenged before the Lower Appellate Court. The Lower Appellate Court in para 8 had considered the statement of the witness Ramsanehi Patel (PW-1) and found that there was possession of the plaintiff on the suit land but the eviction proceedings were taken against him before the Revenue Officer. The Court had also considered the statement of Rajmani Kol (PW-2) and Vanshgopal Patel (PW-3). These witnesses have admitted that the disputed land does not belongs to the plaintiffs and the same is on lease land of Ramaua. In para-11 the Lower Appellate Court recorded a finding that there is no document produced by the plaintiffs that on the what basis he had entered into possession of the suit land and how could he claim title over the suit land. The Trial Court had extensively considered the evidence and the documents and thereafter, recorded the finding that the appellant could not prove his title.

6. The suit of the plaintiff is based on adverse possession and the findings have been recorded by both the Courts against the plaintiffs that there was no adverse possession or continuous hostile and uninterrupted possession which are essential ingredients for the adverse possession. However, the plaintiffs can not based his case on the ground of the adverse possession.

7. The apex court has held in the case of *Gurdwara Sahib Versus Grampanchayat Village Sirthala and another* (2014)1 SCC 669 that the plaintiffs could not seek decree of title on the basis of plea of adverse possession. The relevant para of the said judgment is as under:-

"In so far as first issue is concerned, it was decided in favour

of the plaintiff returning the findings that the appellant was in adverse possession of the suit property since 13.4.1952 as this fact had been proved by plethora of documentary evidence produced by the appellant. However, while deciding the second issue, the court opined that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword. The learned Civil Judge relied upon the judgment of the Punjab and Haryana High Court in *Gurudwara Sahib Sannuali vs. State of Punjab* and thus, decided the issue against the plaintiff. Issue No.3 was also, in the same vein, decided against the appellant."

8. In the present case the appellant/plaintiff based his case on adverse possession which is not legally permissible to seek declaration of title as held by the Apex Court that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword.

9. In this view of the matter, I do not find any illegality or perversity in the concurrent findings recorded by both the Courts. This court is of the considered opinion that as the judgment of the trial Court and its findings have been duly affirmed by the Lower Appellate court which is not perverse and in view of the law laid down by the Apex Court in *Gurudwara Sahib's* case (Supra) as no substantial question of law involved. Hence, the question of interference by this Court does not arise under Section 100 of CPC and the appeal is accordingly dismissed.

No order as to costs.

Appeal dismissed.

I.L.R. [2017] M.P., 902
APPELLATE CRIMINAL
Before Mr. Justice Ashok Kumar Joshi
Cr.A. No. 717/1998 (Jabalpur) decided on 2 December, 2016

SURESH KUMAR & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 304-B/34 & 498-A and

Evidence Act (1 of 1872), Section 113-B **– Dowry death by burning within seven years of marriage – Presumption – Appreciation of Evidence – Conviction – Held – In appreciation of the entire evidence available on record, the prosecution evidence failed to prove beyond reasonable doubt that soon before the death of the deceased or after the marriage deceased was subjected to cruelty or harassment in relation to demand of bicycle in dowry by the present appellants and deceased appellant/accused, thus the trial Court erred in taking resort of Section 113-B of the Evidence Act – Prosecution remained unsuccessful to rule out the possibility of an accidental death of deceased – Trial Court remained unable to properly and legally analyze the prosecution evidence available on record, and totally over looked the material contradictions among the depositions of P.W. 2, P.W. 3 and P.W. 7 and material improvements and exaggerations introduced for the first time in their Court's evidence – Appellant is acquitted from the charge of Section 304-B/34 and 498-A of I.P.C. – Appeal allowed. (Paras 23, 24 & 25)**

दण्ड संहिता (1860 का 45), धारा 304–बी/34 व 498–ए एवं साक्ष्य अधिनियम (1872 का 1), धारा 113–बी – विवाह से 7 वर्षों के भीतर जलाकर दहेज मृत्यु – उपधारणा – साक्ष्य का मूल्यांकन – दोषसिद्धि – अभिनिर्धारित – अभिलेख पर उपलब्ध संपूर्ण साक्ष्य का मूल्यांकन करने पर, अभियोजन साक्ष्य युक्तियुक्त संदेह से परे यह साबित करने में असफल रहे कि मृत्यु से ठीक पूर्व या विवाह के पश्चात् मृतिका के साथ वर्तमान अपीलार्थीगण तथा मृतक अपीलार्थी/अभियुक्त द्वारा दहेज में साईकिल की मांग के संबंध में क्रूरता का व्यवहार या उत्पीड़न किया गया, इसलिए विचारण न्यायालय ने साक्ष्य अधिनियम की धारा 113–बी का सहारा लेकर त्रुटि की है – अभियोजन मृतिका की आकस्मिक मृत्यु की संभावना को खारिज करने में असफल रहा – विचारण न्यायालय अभिलेख पर उपलब्ध अभियोजन साक्ष्य का उचित व वैध रूप से विश्लेषण करने में असमर्थ रहा तथा अ.सा. 2, अ.सा. 3 एवं अ. सा. 7 के अभिसाक्ष्य में तात्विक विरोधाभास एवं उनके न्यायालय के साक्ष्य में प्रथम बार प्रस्तावित तात्विक सुधारों तथा अतिशयोक्ति को पूर्ण रूप से अनदेखा किया – अपीलार्थी भारतीय दण्ड संहिता की धारा 304–बी/34 एवं 498–ए के आरोप से दोषमुक्त किया गया – अपील मंजूर।

Cases referred:

AIR 1990 SC 2134, AIR 2005 SC 785, ILR 2015 M.P. 1825, ILR 2015 M.P. 3036.

D.S. Chouhan with *R.K. Shukla,* for the appellants.
Shobhna Sharma, P.L. for the respondent/State.

JUDGMENT

A.K. Joshi, J. :- By this appeal filed under Section 374 of the Cr.P.C., the appellants have challenged their conviction and sentence recorded in a judgment passed by Fifth Additional Sessions Judge, Rewa on 7.3.1998 in Sessions Trial no.183/1997, whereby each appellant under Section 304-B/34 of the IPC has been sentenced to undergo rigorous imprisonment for seven years and under Section 498-A of the IPC to undergo R.I. for three years with a fine of Rs.200/-. In default of payment of fine, each appellant has been ordered to suffer simple imprisonment for one month and both the substantive jail sentences of each appellant have been directed to run concurrently.

2. It is not disputed that Rotan, the wife of appellant no.1 Suresh had died within seven years of marriage. It would be significant to mention here that during the pendency of this appeal on 31.8.2015, it has been ordered by this Court that due to death of the other appellant Ramavtar, (who was father of appellant No.1 and husband of another appellant) his appeal has been abated.

3. As per prosecution story, on 28/5/1997 in the morning at police station Garh, District Rewa a marg report (Ex.P-5) was lodged by the watchman Babulal (P.W-4) that yesterday in the village Kankar about totally burnt wife of appellant no.1 Suresh expired in the evening at 4:00 P.M. in the house of appellants. Marg report was registered by S.O. Rajendra Prasad Tripathi (P.W-8), its intimation was sent to SDM Sirmor. S.O. Mangawan S.P. Singh (P.W-1) on 28/5/1997 by notice (Ex.P-1) called the witnesses to remained present for preparing Panchnama of corpus (Ex.P-2). He prepared spot map (Ex.P-3) in relation to house of the appellants. On the same day he seized from the kitchen of the appellant's house a chimney made of large bottle and a matchbox through seizure memo (Ex.P-4). The dead body of Rotan Bai aged about 20 years was sent for autopsy to PHC Theonthar, where Dr. A.R. Maravi (P.W-9) started postmortem on 29/5/1997 at 9:00 A.M. and found that the body of deceased was burnt upto 90% and except burn injury on the body there was no any other injury and in his opinion the death of deceased caused within 24-30 hours from starting of postmortem due to shock caused by ante-mortem burn. He recorded postmortem report (Ex.P-11). In inquest inquiry,

statements of witnesses were recorded by Shri S.P. Singh Station Office (sic:officer) of Police Station Mangawan. On the basis of inquest enquiry it was found that the offences punishable under Section 304-B, 498-A and 34 of the IPC were committed by the appellants and deceased appellant Ramavtar. FIR (Ex.P-8) was recorded on 4/7/1997 at police station Garh by Rajendra Prasad Tripathi (P.W-8).

4. During investigation, police statements were recorded and after arrest of the appellants and Ramavtar and completing the investigation, the charge-sheet was filed in the Court of J.M.F.C., Rewa, who on 3.9.1997 committed the case to the Court of Sessions Judge, Rewa who transferred the sessions trial to Fifth A.S.J., Rewa.

5. Each appellant and deceased accused Ramavtar denied the charges framed by the trial Judge under Section 498-A/34 and 304-B/34 of the IPC. During trial, ten prosecution witnesses were examined. It was the defence of the appellants and Ramavtar that appellant No.1 Suresh with his wife Rutan was living separately after his marriage from his parents and they never treated the deceased with cruelty in her life time and never demanded a bicycle in dowry after marriage, because appellant No.1 Suresh was already having a bicycle. In defence, Matukdhari (D.W.1), Govind Prasad (D.W.2) and Vishram (D.W.3) were examined for the appellants. The trial Judge relying on prosecution evidence convicted and sentenced each appellant and Ramavtar as stated aforesaid.

6. The learned counsel for the appellants contended that from the evidence of reporter Babulal (P.W-4) and defence witnesses it was established that the deceased had accidentally burnt working in the kitchen and the father and uncle of the deceased had reached to the house of appellants in the night of date of incident before postmortem, but no any prompt FIR was lodged by them, thus the story of alleged cruelty with the deceased due to demand of a bicycle only is apparently after thought and the evidence of the relating witnesses on the point of dowry demand and cruelty was contradictory and unbelievable, the learned trial Judge has erred in taking assistance of presumption of Section 113-B of the Evidence Act. Thus, acquittal of the present appellant is prayed.

7. On the other hand, the learned panel lawyer for the State contended that just after the incident of burning, Rotan was not taken to hospital for

treatment, in such situation the trial Court has rightly relied on the evidence of father, mother, uncle and other witnesses relating to demand of a bicycle in dowry after the marriage and for cruel treatment with the deceased, as she had died due to unnatural death within a year from the marriage.

8. According to evidence of Dr. A.R. Maravi (P.W-9) and his postmortem report (Ex.P-11), on 29/5/1997 at 9:00 A.M., he found the body of deceased Rootam aged 20 years upto 90% burnt and only feet were not burnt and except burn injury there was no any other injury on the body and in his opinion, the death of Rotan had caused within 24 to 36 hours from postmortem due to shock of ante-mortem burn. In cross-examination, he deposed that it was not possible to state that she was accidentally burnt or voluntarily burnt herself. S.P. Singh (PW1), who conducted inquest enquiry, also deposed that in his enquiry, nothing was brought to his knowledge on the points that whether Rotan burnt herself or she was accidentally burnt or burnt by other persons.

9. Babulal (P.W-4) deposed that on 27/5/1997 at 13-00 hours he was informed by a boy that the wife of appellant no.1 Suresh had burnt inside their house, then he reached to the village Kankar and found that she was sighing and demanding water and on his asking she replied that when she was pouring kerosene in Chulha to spark fire, her dhoti caught fire and thus she had burnt. Babulal deposed that he did not go to the police station and appellant no.1 Suresh also did not go to the police station, thereafter he intimated to the brother of deceased appellant Ramavtar and informed the father of deceased to reach village Kankar as his daughter had burnt and despite his asking, Ramavtar did not went to the police station for reporting, thus in next morning he reached to police station Garh and reported the matter. He proved his signature on marg report (Ex.P-5), but the fact that burnt Rotan had intimated him that she had accidentally burnt at the time of sparking the Chulha is missing in Ex.P-5. Thus, he was declared hostile by the prosecution. He deposed in cross-examination that Rotan had worn the dhoti of terrycot which had stuck to her body and deceased appellant had sent anyone to call for a taxi to Katra.

10. Sukhlal (P.W-2) and Smt. Madhu (P.W-3) and Lalman (P.W-7), father, step-mother and uncle of deceased respectively, deposed that Rotan was married to appellant no.1 Suresh S/o Ramavtar in the summer of 1996. Sukhlal (P.W-2) deposed that he had given a radio, wrist watch and other material at the time of marriage in dowry to the in-laws' of his daughter, but could not

give bicycle. These witnesses deposed that Rotan was sent to the house of appellants after the marriage and after 15 days, when she returned to the parents house, she intimated that her husband, mother-in-law, father-in-law gave her beating, harassed her, scolded her for getting a bicycle in dowry.

11. Madhu (P.W-3) deposed that Rotan had intimated that in appellants' house she was dragged with her hairs and was subjected to beating and it was also stated that if a cycle in dowry would not be given by her parents then she would be murdered. But Sukhlal (P.W-2) and Lalman (P.W-7) had not deposed this fact. Sukhlal (P.W-2) deposed that at the time of festival of Dashehra at his home, in-laws of Rotan had come for taking her back, then father-in-law Ramavtar and his companions have complained that the bicycle of dowry had not been given yet, then he had replied that bicycle would be supplied within 2-4 months. Sukhlal (P.W-2) and his second wife Madhu (P.W-3) had denied the suggestion that after the death of mother of deceased, she was brought-up by her uncle Lalman (P.W-7), but Lalman (P.W-7) has admitted in para no.4 and 15 of his cross-examination that after the death of natural mother of Rotan, she was brought-up by her (sic:his) wife and him as Sukhlal had married again.

12. In the cases of dowry death and dowry demand, the fact of any demand made prior to the marriage gains importance. Lalman (P.W-7) clearly deposed in para no.5 of his cross-examination that before marriage of Rotan no any dowry was fixed and before marriage it was not settled that a bicycle would be given. In para no.5, Lalman deposed that after marriage, when her brother Sukhlal had gone to village Kankar for taking her daughter to parents house, then for the first time, a bicycle was demanded by the appellant no.1 Suresh and this fact was intimated to him by his brother Sukhlal (para 6). Contrary to it, Sukhlal (P.W-2) deposed in para 7 of his cross-examination that before marriage mediation was conducted by Matukdhari (D.W-1) and at the time of marriage bicycle, wrist watch and radio were demanded and wrist-watch and radio were given by him at the time of marriage, but he remained unable in giving bicycle. Thus it is clear that on the point of dowry demand at the time of marriage, the evidence of the father of deceased is contradicted by his real brother Lalman (P.W-7). When for the first time bicycle was demanded, on this point the evidence of these two brothers is not mutually supportive and complimentary. Sukhlal admitted in para 16 of his cross-examination that at the time of marriage bicycle, transistor were not fixed as

dowry items, he explained in para 16 that bicycle was demanded at the time of performing of a custom named *Kaleva*. He also admitted that before cross-examination, he had never told to the police officials or any neighbourer about demand of bicycle by the appellant no.1 Suresh and his father Ramavtar.

13. Step-mother of deceased Madhu (P.W-3) deposed in para no.5 of her cross-examination that at the time of festival of Holi, Rotan had informed her about harassment only by her husband Suresh. Thus, the possibility of false implication of appellant no.2 and her husband could not be ruled out. Lalman (P.W-7) deposed in para no.8 of his cross-examination that despite after receiving information about harassment of Rotan at appellants' house they sent her to appellants' house and before her death, no any report was lodged in this respect.

14. Sukhlal (P.W-2) and Lalman (P.W-7) have deposed that on the date of incident, after receiving the information of incident, Lalman reached to Allahabad to intimate his brother Sukhlal and before the postmortem of the deceased both of them have reached to village Kankar, where they stayed at a house of any Kachhi. Lalman (P.W-7) deposed in examination-in-chief that they have asked to the people of village, who have informed them that the deceased was asked by the in-laws for plucking the Tendu leaves and before one day to the incident, Rotan had gone for plucking leaves in the hills, but in next morning when she was going to pluck the leaves then she was not permitted to leave the house. Lalman (P.W-7) deposed in para 10 that neighbours have informed that when Rotan was preparing food, then at the time of pouring kerosene in Chulha (burner), then the flame caught her body. Contrary to his evidence, his brother Sukhlal (P.W-2) deposed in para 12 that after reaching to the village Kankar, they did not inquire from neighbours of the appellants how his daughter caught fire, though he stayed the whole night at village Kankar and on 29/5/1997 he had reached to the Teonthar hospital, where portmortem was to be conducted, but the dead body was not shown to him. Thus, it is clear that the evidence given by each brother is contrary to the evidence given by the another and thus, appears to full of exaggerations and imaginations.

15. Sukhlal (P.W-2) deposed in para 12 that from Teonthar, he reached to police station Garh, where he lodged the report, but its copy was not supplied to him. In this para no.12, he clearly denied the suggestion given by defence that he never reported to Police, otherwise its copy would have been supplied to him. In next breath, he deposed that on fifth day after the incident

police had intimated him that he should not worry thus, thereafter he never went to police station and his statement was not taken by anyone and he had only lodged the report in police station. During cross-examination, he has been contradicted with his police statement (Ex.D-1) recorded on 4/7/1997. There is no any report of any relative of the deceased on the record. Thus, it is clear that to inspire confidence, Sukhlal (P.W-2), Madhu (P.W-3) and Lalman (P.W-7) have introduced and amalgamated clear falsehood in their depositions.

16. Madhu (P.W-3) deposed in para 5 of her cross-examination that on tenth day after the death of Rotan, she had lodged report at police station Garh and she had gone to police station, as her husband had not reported the matter. Lalman (P.W-7) did not remain behind from his brother and Bhabhi. Lalman deposed in para 12 of his cross-examination that on 30/5/1997, he had gone to police station Garh with his wife, his Bhabhi Madhu and mother Chameli and on that day they all have made report at police station, but copy of their report was not supplied. In para 14 Lalman deposed that on second occasion, after about one month he had reached to police station with brother Sukhlal and his wife and at that time their statements were recorded.

17. Some material contradictions and omissions have been established in cross-examination of Sukhlal (P.W-2), Madhu (P.W-3) and Lalman (P.W-7) in relation to their Court's depositions and their police statements recorded on 4/7/1997. Their statements recorded during inquest inquiry are not on record. Investigator Rajendra Prasad Tripathi (P.W-8) deposed in para 11 of his cross-examination that he had not received any report lodged by the parents or relatives of deceased and description of the harassment was not intimated to him, thus it was not recorded by him in police statements of above mentioned three witnesses. In para no.12 he deposed that he received copy of a complaint made by Lalman to the S.P., but he had taken back that complaint to S.P. Office, because marg had been registered. Thus, the statements given by each of Sukhlal (P.W-2) Madhu (P.W-3) and Lalman (P.W-7) regarding lodging of report by each of them at police station Garh is falsified by the evidence of Rajendra Prasad Tripathi (P.W-8), who was S.O. of relating police station at that time.

18. It is understandable that during the lifetime of harassed daughter at her in-laws' house, such harassment is not timely reported to the police, as the parents try to pacify the demands of the in-laws, but in such cases, the conduct of the parents and their other relatives after the death of concerned

deceased, gains much importance. If parents were informed by their daughter about her physical and mental harassment at in-laws' house, then delay in reporting the matter to the police or others would adversely affect the veracity of their depositions. In all of the above mentioned facts and circumstances, the mutual contradictory evidence on material points of Sukhlal (P.W-2), Madhu (P.W-3) and Lalman (P.W-7) do not inspire confidence in relation to the alleged dowry demand and alleged harassment in relation to it.

19. Matukdhari (D.W-1), who was mediator before the marriage, according to the testimony of father of deceased, deposed that his daughter has been married in the family of uncle of Sukhlal (P.W-2) and both parties are his relatives and dowry was not demanded before the marriage of Rotan with appellant no.1 and after marriage appellant no.1 Suresh had started living separately with his father and mother and Suresh was already having and using a bicycle and after the incident Sukhlal and Lalman have never made any complaint to him about appellants. Govind Prasad (D.W-2) and Vishram (D.W-3) have also deposed that appellant no.1 Suresh was doing the work of making *pattal* and *douna* and they have attended the marriage of Suresh with Rotan. Govind Prasad (D.W-2) deposed that Sukhlal (P.W-2) and Lalman (P.W-7) are sons of his mamiya sasur and appellants are also his relatives and before marriage no dowry was demanded and no any dowry item was given. Vishram (D.W-3) deposed that on the date of incident, the father-in-law of appellant no.1 Suresh and his brother were stayed in village Kankar near to his house and in the cremation ceremony also they were present and at that time also it was not intimated that the deceased was being harassed by the appellants. Thus, the evidence of Sukhlal (P.W-2), Madhu (P.W-3) and Lalman (P.W-7) do not appear to be natural and believable.

20. The allegation of demand of a bicycle only in dowry after marriage, is indicative of economic status of parents and in-laws' of the deceased. In the case of *Ashok Kumar vs. State of Rajasthan* (AIR 1990 SC 2134), it has been observed in para no.4 of the judgment as follows:-

> "Bride burning is a shame of our society. Poor never resort to it. Rich do not need it. Obviously, because it is basically an economic problem of a class which suffers both from ego and complex."

21. In relation to Section 113-B of the Evidence Act and Section 304-B

of the IPC, it has been observed by the Hon'ble Apex Court in the case of *Kamlesh Panjiayar vs. State of Bihar*, (AIR 2005 SC 785) in para no.11 as follows:-

> "A conjoint reading of Section 113-B of the Evidence Act and section 304-B of the IPC shows that there must be material to show that soon before her death, the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances." The expression 'soon before' is very relevant where section 113-B of the Evidence Act and Section 304-B are pressed in to service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution."

22. In the present case there is no definite evidence about the time gap between the incident and death of deceased. It is clear from the evidence of this case that the village watchman was intimated about the incident and the parents and other relatives of the deceased were intimated and called for and the appellants did not try for early cremation of the dead body of the deceased. Such conduct of the appellants would not have been possible after the incident, if the deceased was being treated with cruelty in relation to dowry demand of a bicycle. It is clear from the evidence of the case that the prosecution remained unsuccessful to rule out the possibility of an accidental death of deceased. According to the evidence of Babulal (P.W-4), who is a resident of other village Dadh, the deceased had intimated him about her accidental burn. His evidence on this point is supported by Maniklal (P.W-5), Dhirendra Singh (P.W-6) and Vishram (D.W-3). In the light of citation of *Arun vs. State of M.P.* (ILR 2015 M.P. 1825), it is clear that in this case also the matter was never referred to Panchayat and no FIR was lodged in her lifetime, thus the omnibus allegation that the present appellants and Ramavtar were demanding a bicycle in dowry do not inspire confidence. The father of the deceased Sukhlal (P.W-2) in his cross-examination in para 10 had stated that the appellant No.1 Suresh was having a bicycle. In the light of citation of *Dilip vs. State of M.P.* (ILR 2015 M.P. 3036), it is clear that in this case also father and other relatives of deceased were present at the time of autopsy,

but did not allege anything against appellants at that time.

23. In light of the above mentioned citations, I am of the considered view that in this case, the prosecution evidence failed to prove beyond reasonable doubt that soon before the death of Rotan alias Rutan or after the marriage she was subjected to cruelty or harassment in relation to demand of bicycle in dowry by the present appellants and deceased appellant, thus the learned trial Court erred in taking resort of Section 113-B of the Evidence Act. It is also clear that the learned trial Court remained unable to properly and legally analyze the prosecution evidence available on record, and totally overlooked the material contradictions among the depositions of Sukhlal (P.W-2), Madhu (P.W-3) and Lalman (P.W-7) and material improvements and exaggerations introduced for the first time in their Court's evidence.

24. On the basis of the aforesaid discussion the appellants cannot be convicted of offences under Section 304-B and 498-A of the IPC, and therefore, appeal filed by the appellants appears to be acceptable

25. In the result, the appeal filed by the appellants is allowed and the conviction and sentence recorded by the above mentioned trial Court of each appellant under Section 304-B/34 and 498-A of IPC is set aside and each appellant is acquitted from the charge of Section 304-B/34 and 498-A of the IPC. Both appellants have been released on bail after suspending their jail sentence. Their bail bonds are discharged. The order of the trial Court relating to disposal of the property relating to the case is confirmed.

Appeal allowed.

I.L.R. [2017] M.P., 912
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta & Mr. Justice Anand Pathak
Cr.A. No. 610/1998 (Gwalior) decided on 19 January, 2017

KALLU @ KAMMOD RAWAT @ KALYAN & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 r/w 34 – Appeal against conviction **– Witness stated that the appellants assaulted the deceased with an axe whereas according to the post-mortem report no such injury was found on the body of deceased which could be caused by sharp cutting**

weapon – No indication of dragging was found in the post mortem report – According to eyewitness, deceased was assaulted with heavy log on the back but no such injury was found on the back of the deceased – Evidence of eyewitnesses regarding the injuries caused to the deceased is not found corroborated by the post mortem report – Chain of circumstantial evidence is broken – There is no evidence of last seen against the appellants to connect them with crime – Conviction and sentence for offence u/S 302 r/w Section 34 of the IPC is set aside. (Paras 7, 8, 18 & 21)

दण्ड संहिता (1860 का 45), धारा 302 सहपठित 34 – दोषसिद्धि के विरूद्ध अपील – साक्षी ने कथन किया कि अपीलार्थीगण ने मृतक पर कुल्हाड़ी से हमला किया था, जबकि शव–परीक्षण रिपोर्ट के अनुसार मृतक के शरीर पर ऐसी कोई चोट नहीं मिली जो कि धारदार काटने वाले हथियार से कारित हो सकती थी – शव–परीक्षण रिपोर्ट में घसीटने का कोई संकेत नहीं पाया गया – चक्षुदर्शी साक्षी के अनुसार मृतक की पीठ पर किसी भारी लकड़ी के लट्ठे से हमला किया गया था, परंतु मृतक की पीठ पर ऐसी कोई चोट नहीं पाई गई – मृतक को कारित हुई क्षति के संबंध में चक्षुदर्शी साक्षीगण के साक्ष्य, शव–परीक्षण रिपोर्ट से संपुष्ट नहीं पाए गये – परिस्थितिजन्य साक्ष्य की श्रृंखला खंडित है – अपीलार्थीगण को अपराध से जोड़ने के लिए उनके विरूद्ध अंतिम बार देखे जाने का कोई साक्ष्य नहीं है – भारतीय दण्ड संहिता की धारा 302 सहपठित धारा 34 के अंतर्गत दोषसिद्धि एवं दण्डादेश अपास्त।

Cases referred:

AIR 2003 SC 854, AIR 1982 SC 839, (2014) 12 SC 312, AIR 1976 SC 2423, AIR 1974 SC 1193, AIR 1975 SC 1400, AIR 1993 SC 2457.

R.P. Singh, for the appellant No. 1.
Prabal Solanki, for the appellants No. 2, 3 & 4.
Anjali Gyanani, P.P. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **N.K. GUPTA, J. :-** The appellants have preferred the present appeal being aggrieved with the judgment dated 20.11.1998 passed by the second Additional Sessions Judge, Shivpuri in S.T. No. 88/1995, whereby all of the appellants have been convicted of offence under Section 302 read with Section 34 (two count) of IPC and sentenced to life imprisonment with fine of Rs.2,000/- on each count of charge. Default sentence in lieu of payment of fine was also

prescribed.

2. The prosecution's case, in short, is that the deceased Lokendra Singh was facing a trial before the Additional Sessions Judge, Dabra that he abducted wife of appellant No. 3 Preetam and committed rape upon her. On 13.02.1995 the deceased Lokendra along with the deceased Parmal Singh went to attend the Court of Additional Sessions Judge Dabra and on that day, they stayed at Dabra in the night, thereafter on 14.02.1995 deceased Lokendra Singh, Parmal Singh along with the witness Parashram (PW-13) went to the house of Manju and appellant No. 3 Preetam to have a talk of compromise. They reached village Girwani at about 4 to 5 PM in the evening and they took dinner in the house of appellant No. 3 Preetam and stayed in the night. When they talked about the compromise then appellants No. 2, 3 and 4 have replied that compromise should be dependent upon appellant No. 1 Kallu @ Kammod and, therefore, appellant No. 4 Pappu @ Shivraj Singh was sent to village Amrol to bring the appellant No. 1 Kallu @ Kammod. On 15.02.1995 at about 10:00 AM in the morning deceased Lokendra Singh, Parmal Singh and witness Parashram (PW-13) were seated in a room in the house of appellant No. 3 Preetam then Preetam told about the arrival of the appellant Kallu @ Kammod and Shivraj. Thereafter, all of the accused persons had a talk in a separate room. Again at about 10:30 AM, the appellants came inside the room and held Parashram (PW-13) and thereafter the accused persons held Lokendra Singh and Parmal Singh and tied their hands on their back and, thereafter they took them on the public way by beating them. Various villagers gathered at the spot thereafter the appellants Kallu and Preetam assaulted the deceased Lokendra Singh and Parmal Singh by axes, whereas Shivraj assaulted with a heavy wooden log and Ramjilal assaulted with a stick to the deceased Lokendra Singh and Parmal Singh. In the meantime, Ramjilal held the witness Parashram. After beating when Lokendra Singh and Parmal Singh fell down on the ground, Kallu gave a blow of axe to the deceased Lokendra Singh causing injury on his jaw. The appellant Preetam gave a blow of axe on the head of Lokendra Singh as well as Parmal Singh. Lokendra Singh died at the spot whereas Parmal Singh dragged for a short distance and thereafter he died. Parashram (PW-13) thereafter had escaped and ran towards the forest. He was chased by the appellants but he could not be caught. Ultimately Parashram went to the Police Station Govardhan at about 02:10 PM and lodged the FIR Ex. P20 before the SHO R.P. Mishra (PW-16). SHO R.P. Mishra visited the spot and took the dead bodies of the deceased Lokendra Singh and Parmal Singh for their postmortem and their bodies were sent for postmortem. Dr. A.K. Morya (PW-1)

performed the postmortem on the bodies of the deceased Lokendra Singh and Parmal Singh and gave his report Ex. P-1 and Ex. P-2 respectively. Four injuries were found on the deceased Lokendra Singh. Out of them, two were incised wounds found on the mandible area, whereas one contusion was found below the left eyelid and one contusion was found on the parietal portion of the head. The deceased Lokendra Singh died due to various injuries caused to him. Dr. Morya gave a report Ex. P-2 relating to Parmal Singh. He found three contusions on him. Out of them, one contusion was on his head and the deceased Parmal Singh died due to head injury. Thereafter the appellants were arrested and various weapons were recovered from them. However, no forensic science laboratory's report was filed before the trial Court till the disposal of the case. After due investigation, the charge-sheet was filed before the JMFC, Pohari who committed the case to the Court of Sessions and ultimately it was transferred to the second Additional Sessions Judge, Shivpuri.

3. The appellants abjured their guilt. They took a plea that they were falsely implicated in the matter due to enmity, however, no defence evidence was adduced.

4. Initially Shri Prabal Solanki, Advocate was engaged for all of the appellants but in the meantime when no one was appearing for the appellants, Shri R.P. Singh, Advocate was appointed from the side of High Court Legal Services Committee for the appellant No. 1 Kallu @ Kammod.

5. We have heard the learned counsel for the parties at length.

6. First of all, it is to be considered as to whether the death of the deceased Lokendra Singh and Parmal Singh was homicidal in nature. In this connection, evidence given by Dr. A.K. Morya (PW-1) may be considered. Dr. Morya performed the postmortem on the body of the deceased Lokendra Singh and gave a report Ex. P-1. He found the following injuries to the deceased Lokendra Singh:-

> "1. Ante-mortem Incised wound: size 10cmxlcmxlcm clean cut margin extent horizontally muscle clean cut, on dissection left side mandible fractured, situated left side chin lower part
>
> 2. Ante-mortem incised wound: size 6cmxlcmxlcm clean cut margin, deep tissue clean cut, ext

horizontally, on dissection fracture of middle upper part of mandible.

3. Contusion ante-mortem: bluish colour size 5cmx2cm, on dissection haematoma present situated at lower part of left eye lower lid.

4. Contusion ante-mortem: size 8cmx2cm blue colour, rod shape swelling, on dissection haematoma present, there is compress comminuted fractured both parietal bones, internal subdural, sub-archnoid, inter-cerebral haemorrhage present laceration of parietal lobe of brain present."

On opening of the body, compressed comminuted fracture of parietal bone was found and the deceased died due to head injury. According to Dr. Morya, death of the deceased was homicidal in nature. Similarly, he performed the postmortem on the body of the deceased Parmal Singh and gave a report Ex. P-2. He found the following injuries to the deceased Parmal Singh:-

"1. Ante-mortem contusion: size l0cmx4cm bluish dark colour pulpy swelling at right side temporal region of scalp, on dissection sub temporal region of scalp contain dark blood, there is comminuted fracture of right temporal bone present, this fracture caused laceration of temporal lobe of cerebral right side with cerebral haemorrhage.

2. Contusion ante-mortem: size 6cmx4cm bluish dark colour, over right maxillary region of face. On dissection right side subcutanious haematoma present, there is fracture of right maxilla, right zygomatic profess. Both cornu of right mandible.

3. Contusion ante-mortem: diffuse bluish dark colour swelling at lower part of left hand arm, on dissection there is complete fracture of left lower part of humor bone with haematoma muscle tender torn."

There were three contusions found to the deceased Parmal Singh. Out of them, one was on the head and below that injury there was a comminuted fracture of temporal bone and brain below that portion was found lacerated. According to Dr. Morya, the deceased died due to head injury and death of

the deceased Parmal Singh was also homicidal in nature. There is no reason to doubt on the opinion given by Dr. Morya about the death of Lokendra Singh and Parmal Singh. Hence, the trial Court has rightly found that the death of the deceased Lokendra Singh and Parmal Singh was homicidal in nature.

7. The main object in the case is as to whether the appellants assaulted the deceased Lokendra Singh and Parmal Singh causing their death. In this connection, various eyewitnesses were examined and some of the eyewitnesses were given up. Eyewitnesses Ramdayal Yadav (PW-3) and Ramswaroop (PW-4) have turned partly hostile. They did not claim that those were the eyewitnesses, however, Parashram (PW-13) has stated about the entire incident, as to how the appellants killed the deceased Lokendra Singh and Parmal Singh. According to the learned counsel for the appellants, Parashram was a planted witness and he was not the actual eyewitness in the case. Various submissions are made by the learned counsel for the appellants to show that Parashram was not at all an eyewitness in the case. Some of the contentions advanced by the learned counsel for the appellants relating to the testimony of witness Parashram are acceptable. Hence, the evidence of Parashram should be examined with caution. Evidence of Parashram was dully (sic:duly) corroborated by Jagat Singh (PW-14) who has stated that in early morning, the appellant Shivraj met him at village Amrol asking the address of appellant Kallu @ Kammod, whereas Lakharam (PW15) has stated that at about 06:00 AM, when he was coming from answering the call of nature, he saw the appellant Kallu and Shivraj going on motorcycle towards the village Girwani. The statement of Parashram was duly corroborated by the FIR Ex. P-20. The document Ex. P-20 indicates that the incident took place at about 10:40 AM, whereas the FIR was lodged at about 02:10 PM. The reason of delay shown by Parashram is that when he escaped himself from the clutches of the appellants, he went into the forest and thereafter he could not trace then the way out and, therefore, he could not reach the Police Station Govardhan within reasonable time though Police Station Govardhan was hardly three kilometers away from the spot.

8. First of all as contended by the learned counsel for the appellants, evidence of Parashram is examined vis-a-vis with medical evidence as proved by Dr. AK. Morya (PW-1) then it would be apparent that Parashram has stated that the appellants Kallu and Preetam assaulted the deceased Parmal Singh with an axe, whereas according to the postmortem report Ex. P-2 proved

by Dr. Morya (PW-1), no injury was found on the deceased Parmal Singh, which could be caused by sharp cutting weapon like axe. Similarly, it is stated by Parasharam that Parmal Singh dragged for a shorter distance, however, no such indication of dragging was found by Dr. Morya in the postmortem report Ex. P-2. Similarly, according to him, Kallu and Preetam gave blow of axes to the deceased Lokendra Singh for so many times but only two incised wounds were found by Dr. Morya in the postmortem report Ex. P-1 of Lokendra Singh and both the wounds were on the mandible region around face. According to Parashram, appellant Shivraj assaulted Lokendra Singh and Parmal Singh with a heavy log and Lokendra Singh sustained an injury of that heavy log on his back, however, Dr. Morya did not find any injury on the back of the deceased Lokendra Singh. Hence, if Parasharm was an eyewitness then as to how, his description does not match with the medical evidence. Looking to the postmortem report as given by Dr. Morya, evidence of eyewitness Parashram comes under the clouds of doubt. In this context, judgment passed by the Apex Court in case of *"Lallu Manjhi and another Vs. State of Jharkhand"* [AIR 2003 SC 854] may be referred, in which it is held that if evidence of sole eyewitness who was interested being relative of the deceased cannot be accepted if it is contradictory with the medical evidence and not fully corroborated by the medical evidence. It is held that no reliance on such witness can be placed.

9. One Jagat Singh (PW-14) has stated that he saw the appellant Shivraj who was tracing for the house of Kallu at village Amrol. Since there were two ways, the appellant Shivraj asked him about the correct way. The witness Jagat Singh has accepted that in relation, the deceased Lokendra Singh was his grand son and, therefore, possibility cannot be ruled out that being an interested witness, he has stated a falsehood. If his statement is considered with the statement of Lakharam (PW-15) then Lakharam has accepted in his cross-examination that after marriage of Manju, Shivraj was regular visitor to the house of Kallu and, therefore, there was no need with the appellant Shivraj to ask about the address of Kallu from the witness Jagat Singh (PW-14). Hence, the claim of the witness Jagat Singh cannot be accepted that he saw the appellant Shivraj at that particular day when he was trying to find appellant Kallu. Similarly Lakharam (PW-15) has accepted that he was real brother of one Bhajan Singh father of Parmal Singh and, therefore, he could state against the appellants because his nephew Parmal Singh was killed in the incident. Hence, the support of evidence given by Jagat Singh and Lakharam has no

much value in relation to the evidence given by Parashram that the appellant Shivraj went to village Amrol and took the appellant Kallu @ Kammod with him and, thereafter the appellants assaulted the various victims.

10. Parashram has stated that he along with Lokendra Singh and Parmal Singh visited the house of Preetam on 14.02.1995 in the evening and they had shown their wishes for compromise, therefore, the appellants No. 2, 3 and 4 namely Ramjilal, Preetam and Pappu @ Shivraj permitted them to reside in the house. They served the dinner and thereafter on next day morning, appellant Shivraj went to bring the appellant Kallu @ Kammod from village Amrol. On the other hand, Parashram has accepted in the cross-examination that after lodging of the case of rape against the deceased Lokendra Singh, parents of Manju could not settle her marriage in nearby areas among their caste-fellows and, therefore, marriage of girl Manju was performed with Preetam at distant place and he did not attend that marriage. Such statement indicates that husband and brothers of husband of Manju did not know about that story of rape committed upon Manju and, there was no possibility that if the deceased Lokendra Singh and Parmal Singh would have visited directly to the house of Preetam for a proposal of compromise, they would have greeted or permitted to reside in the house. It was unnatural for these persons to visit the house of Manju for compromise when marriage of Manju was settled with difficulty with Preetam then certainly proposal of the deceased Lokendra Singh and Parmal Singh could be a news for the appellant Preetam and his brothers and, hence, Parmal Singh and Lokendra Singh could not be permitted in the house of Preetam, therefore, the story as told by Parashram is totally unnatural.

11. The learned Additional Sessions Judge has mentioned the submissions made by the learned defence counsel before him that the deceased persons Lokendra Singh and Parmal Singh went to village Girwani. They held the prosecutrix Manju in the morning when she was going to answer the call of nature and thereafter the various villagers assaulted the deceased Lokendra Singh and Parmal Singh and killed them. Investigation Officer R.P. Mishra has accepted in Para 7 of his cross-examination that when he visited the village Girwani, he found that 40% of the houses in the village were locked and various villagers were not present in the village. Hence, possibility cannot be ruled out that those villagers were responsible for the death of the deceased Lokendra Singh and Parmal Singh and, therefore, having guilty conscious they absconded. Under these circumstances, the story prepared by Parashram

appears to be unnatural and it is not possible that Lokendra Singh, Parmal Singh and Parashram would have permitted to reside in the house of appellant Preetam in the entire night and they would have served with a dinner.

12. Second unnaturality, which is visible in the story that Lokendra Singh was prosecuted for offence of rape along with one Nawab and, therefore, there was no reason for the appellants to kill the deceased Parmal. If they would have killed the deceased Parmal because he was companion of the deceased Lokendra Singh then on the same analogy, they would have killed the witness Parashram (PW-13). It is surprising that appellants assaulted the deceased Lokendra Singh and Parmal Singh brutally but they did not touch the witness Parashram (PW-13). Ramjilal was participating in assaulting the deceased Lokendra Singh and Parmal Singh that is unnatural and impossible allegation as made by Parashram, if Ramjilal would have held Parashram then he could not have participated in beating Lokendra Singh and Parmal Singh. It is not claimed by Parashram that he was in uniform of constable at that time and, therefore, if the appellants would have beaten the deceased Parmal Singh being a friend of the deceased Lokendra Singh then Parashram would also have been killed at the spot by the appellants. It is surprising that the witness Parashram (PW-13) did not have a single injury of assault caused upon him. He could not show any reason as to why he was spared by the appellants, whereas the deceased Parmal Singh was killed by them without any reason. There was no overt act of Parmal Singh so that he would be killed by the appellants due to enmity. Lakharam (PW-15) etc. could not show any enmity of the deceased Parmal Singh with any of the appellants and, therefore, by that reason, testimony of the witness Parashram (PW-13) appears to be doubtful.

13. If conduct of Parashram (PW-13) and Investigation Officer R.P. Mishra (PW.-16) is considered then it would be apparent that R.P. Mishra along with constable Parashram who was relative of the deceased Lokendra Singh cooked a nice story to implicate all of the appellants. That cooking of the story is apparent by non-compliance of provision under Section 157 of the Cr.P.C. The FIR is shown to be written at about 02:10 PM on 15.02.1995. In this connection, Head Constable Devi Singh (PW 12) has stated that counter of FIR was sent to the concerned JMFC and dispatch register Ex. P-18 and dak book Receipt is Ex. P-19. According to the dak book receipt Ex. P-19 counter of the FIR was received by the concerned Magistrate on 16.02.1995. When

the report was lodged at 02:10 PM then counter could be communicated to the concerned Magistrate on the same very day. If dispatch register is perused then it appears that there is an interpolation of date in the dispatch register. Serial No. 276 is shown to be an entry relating to dispatch of counter of FIR to the JMFC concerned, whereas entry No. 279 indicates that rojnamcha entry dated 14.02.1995 was dispatched to the SDO(P) concerned. It indicates that in that page of dispatch register, the entry was started from 273 and date was 14.02.2015 and up to entry No. 279, the concerned police official did not repeat the date but only mark of "ditto" (--"--) was given against each entry from 274 to 279 and thereafter such mark was overwritten with the date 15.02.1995, whereas the entries from 277 to 279 were not the entries of 15.02.1995 but such were the entries of 14.02.1995. Similarly on station delivery book Ex. P-19, there is no entry that the counter of FIR was received by the Magistrate on 15.02.1995. It is surprising that only single entry was proved by the prosecution that counter of FIR was received in the Court of JMFC on 16.02.1995. When the merg intimation Ex. P-21 was recorded on the same very day then as to why a dispatch No. 281 was given to that merg entry which was to be sent to the SDM immediately. It clearly indicates that an interpolation is done and entry No. 276 is shown on the page which was pre-occupied by the entries dated 14.02.1995 and that interpolation in the dispatch register clearly indicates that no compliance under Section 157 of Cr.P.C. was done by the Investigation Officer to ensure that the FIR was not written ante-time or ante-date.

14. Learned counsel for the appellants placed his reliance upon the judgments passed by the Apex Court in cases of *"Mohanlal Gangaram Gehani Vs. State of Maharashtra"* [AIR 1982 SC 839] and *"Sudarshan and another Vs. State of Maharashtra"* [(2014) 12 SC 312]. In both the cases, the Apex Court has appreciated the evidence and found that the FIR was written ante-time or ante-date and, therefore, such FIR was not relied upon. In this connection, the evidence given by Lakharam (PW-15) may be considered. Lakharam has accepted in Para 2 of his statement that on the evening of 15.02.1995, police went to the village Amrol and police had an apprehension that the dead bodies found by the police were of Lokendra Singh and Nawab who were the accused of that rape case and when the witness Lakharam went to the spot then he identified the second dead body as of Parmal Singh. If Parashram had accompanied, Lokendra Singh and Parmal Singh from very beginning then there was no need to Lakharam to

identify the dead body of the second person and whereas police was claiming it to be a dead body of one Nawab who was co-accused with Lokendra Singh in the rape case. Hence, by statement of Lakhatam (sic:Lakharam), it would be apparent that the police, i.e., Investigation Officer R.P. Mishra (PW-16) had no knowledge about the death of the deceased Parmal Singh and he thought that it was the dead body of Nawab, who was the co-accused of deceased Lokendra Singh. Hence, named FIR could not be lodged at about 02:10 PM claiming the death of the deceased Lokendra Singh and Parmal Singh. Till the evening police was in doubt that dead bodies were of Lokendra Singh and Nawab. Hence, it is apparent that SHO R.P. Mishra (PW-16) had recorded the FIR in this case much after the time which is shown in the FIR and, therefore, it was written ante-time.

15. SHO R.P. Mishra (PW-16) has stated about the various *rojnamchas*, in which interpolation was found, however, the trial Court did not take the *rojnamcha* on record and no photocopy of such *rojnamcha* is available on record; however, he has claimed that the counter of the FIR was timely sent to the JMFC concerned but looking to the receipt on station delivery book Ex. P-19, the counter was received on 16.02.1995, i.e., next day of the registration of the FIR. Hence, it cannot be said that the counter of the FIR was timely dispatched to the concerned Magistrate.

16. In this connection, the judgments passed by the Apex Court in cases of *"Ishwar Singh Vs. The State of Uttar Pradesh"* [AIR 1976 SC 2423] and *"Datar Singh Vs. The State of Punjab"* [AIR 1974 SC 1193] may be perused, in which it is held that non-compliance of provision under Section 157 of CrP.C. indicates that FIR could be written ante-time or ante-date.

17. On considering the statement of Lakharam, it would be apparent that the Investigation Officer R.P. Mishra called the constable Parashram, who was relative of the deceased Lokendra Singh who claimed himself to be an eyewitness otherwise if Parashram was with the deceased persons then he would have sustained injuries or he could immediately state as mentioned in the FIR Ex.P-20 that the dead bodies were of Lokendra Singh and Parmal Singh and there was no possibility of any confusion that the second dead body was of Nawab or Parmal Singh. In this connection, the judgments passed by the Apex Court in cases of *"Jagir Singh Vs. The State (Delhi Administration)"* [AIR 1975 SC 1400] and *"Govind Narain and another Vs. State of Rajasthan"* [AIR 1993 SC 2457], may be referred, in which the

Apex Court appreciated the evidence and found that the testimony of the sole eyewitness was highly doubtful and the Apex Court discarded that testimony of the eyewitness on the ground that he was not present at the spot. In the light of the judgments passed by the Apex Court in the aforesaid cases *Jagir Singh* (supra) and *Govind Narain* (supra), it appears that the testimony of Parashram (PW-13) was wrongly accepted by the trial Court. Parashram was not at all an eyewitness. He was the cooked witness cooked by Investigation Officer R.P. Mishra (PW-16). Hence, after deleting the testimony of Parashram, there is no eyewitness in the case and it is the duty of the Court to consider the circumstantial evidence which is against the appellants. Investigation Officer R.P. Mishra (PW-16) has claimed that various weapons were seized from the appellants. However, since no forensic science laboratory report was filed during the trial, an adverse inference shall be drawn against the Investigation Officer that he knew that there was no blood or human blood on those weapons, which were seized from the appellants. Hence, seizure of the weapons has no evidentiary value against the appellants.

18. As discussed above, that testimony of witness Jagat Singh (PW-14) and Lakharam (PW-15) is not acceptable and being relative of the deceased Lokendra Singh, they claimed themselves to be witnesses relating to transit of Shivraj and Kallu, hence, discarding their evidence, there is no evidence of last scene against the appellants to connect them with the crime. Except the fact that the dead bodies of the deceased Lokendra Singh and Parmal Singh were found at village Girwani, there is no reason to blame the appellants Ramjilal, Preetam, Pappu @ Shivraj that they were interested to kill the deceased Lokendra Singh and Parmal Singh.

19. It is established that there was enmity between Kallu @ Kammod and the deceased Lokendra Singh because Lokendra Singh had kidnapped Manju sister of appellant Kallu @ Kammod and committed rape upon her and he was facing a trial. Therefore, Kallu had a motive /enmity to kill the deceased Lokendra Singh, however, it is nowhere proved that the appellants had any enmity with the deceased Parmal Singh so that he could be killed. Possibility cannot be ruled out that Preetam etc. did not know about the pendency of rape case lodged against Lokendra Singh and thereafter Lokendra Singh along with Parmal Singh went to the village Girwani to pressurize the prosecutrix so that she would not take step against them. However, the judgment cannot be passed on the basis of any suspicion. Suspicion never takes the shape of evidence. Under these circumstances, chain of circumstantial

evidence is broken. There is no circumstance proved by the prosecution by which it can be said that the appellants were the persons who killed the deceased Lokendra Singh or Parmal Singh.

20. On the basis of the aforesaid discussion, neither any acceptable ocular evidence was present in the case nor chain of circumstantial evidence is complete. Prosecution has utterly failed to prove that the appellants have participated in killing the deceased Lokendra Singh and Parmal Singh. They could not be convicted of offence under Section 302 of IPC or any inferior offence of the same nature either directly or with help of Section 34 of IPC. The trial Court has committed an error in convicting them for two count charges of Section 302 or 302 read with Section 34 of IPC.

21. On the basis of the aforesaid discussion, the appeal filed by the appellants namely **Kallu @ Kammod Rawat @ Kalyan, Ramjilal, Preetam and Pappu @ Shivraj** appears to be acceptable and consequently, the same is hereby allowed. Conviction as well as the sentence recorded by the trial Court on two count charges of offence under Section 302 read with Section 34 of IPC is hereby set aside. All the appellants are acquitted from the aforesaid charges. They would be entitled to get the fine amount back if they have deposited the same before the trial Court.

22. Appellants are on bail. Their presence is no more required before this Court and, therefore, it is directed that their bail bonds shall stand discharged.

23. Copy of the judgment be sent to the Court below along with its record for information and compliance.

Appeal allowed.

I.L.R. [2017] M.P., 924
APPELLATE CRIMINAL
Before Mr. Justice S.C. Sharma & Mr. Justice Rajeev Kumar Dubey
Cr.A. No. 1880/2014 (Indore) decided on 19 January, 2017

RAJESH KHATIK ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Prevention of Corruption Act (49 of 1988), Section 7 & 13(2) – Complainant turning hostile – Effect* – Even if the complainant has**

turned hostile, part of his statement which supports the prosecution story can be relied on – For proving the offence u/S 7 and 13(1)(d) of the Act, both demand and acceptance need to be proved but if complainant turned hostile, it can also be proved by circumstantial or other oral documentary evidence – Evidence of the hostile witness cannot be rejected merely because he has been declared hostile and such evidence does not become effaced from the record – Relevant portion of evidence of hostile witness can be used at least to corroborate the evidence of other independent witnesses – In the present case, FSL report of hand wash, trouser wash and note wash clearly indicates the recovery of bribe money – Basic ingredients i.e. Demand of bribe, its acceptance and recovery of currency notes, required to prove the offence, stands duly proved beyond reasonable doubt – Ocular testimony of prosecution witnesses has been duly corroborated by the documentary evidence – Based on the facts and evidence, a legitimate presumption can be drawn that appellant has received or accepted the said currency notes on his own volition – Trial Court rightly convicted the appellant – Appeal dismissed. (Paras 11, 13, 15, 24, 25 & 27)

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 व 13(2) – परिवादी का पक्षद्रोही हो जाना – प्रभाव – यद्यपि परिवादी पक्षद्रोही हो चुका है, उसके कथनों का वह भाग जो अभियोजन कहानी का समर्थन करता है उस पर विश्वास किया जा सकता है – अधिनियम की धारा 7 एवं 13(1)(डी) के अंतर्गत अपराध को साबित करने हेतु, मांग एवं प्रतिग्रहण दोनों को साबित करने की आवश्यकता है, परंतु यदि परिवादी पक्षद्रोही हो चुका है, तो इसे परिस्थितिजन्य या अन्य मौखिक दस्तावेजी साक्ष्य द्वारा भी साबित किया जा सकता है – पक्षद्रोही साक्षी का साक्ष्य मात्र इसलिए अस्वीकार नहीं किया जा सकता कि उसे पक्षद्रोही घोषित कर दिया गया है तथा ऐसे साक्ष्य अभिलेख पर से मिटने वाले नहीं होते हैं – पक्षद्रोही साक्षी के साक्ष्य का सुसंगत भाग को कम से कम अन्य स्वतंत्र साक्षीगण के साक्ष्य की संपुष्टि करने हेतु उपयोग किया जा सकता है – वर्तमान प्रकरण में, हाथ, पतलून और नोट के धोवन की एफ.एस.एल. रिपोर्ट, स्पष्ट रूप से रिश्वत के रूपये की बरामदगी इंगित करती है – आधारभूत घटक अर्थात् रिश्वत की मांग, उसका प्रतिग्रहण तथा करेंसी नोट की बरामदगी जो अपराध साबित करने के लिए अपेक्षित है, युक्तियुक्त संदेह से परे सम्यक् रूप से साबित होते हैं – अभियोजन साक्षीगण की चाक्षुष परिसाक्ष्य को दस्तावेजी साक्ष्य द्वारा सम्यक् रूप से अभिपुष्ट किया गया है – तथ्य एवं साक्ष्य के आधार पर विधिसम्मत उपधारणा निकाली जा सकती है कि अपीलार्थी ने उसकी स्वेच्छा से उक्त करेंसी नोट को अभिप्राप्त अथवा प्रतिगृहीत किया है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया –

अपील खारिज।

Cases referred:

2002 (2) G.L.H. 654, AIR 2016 SC 298, (2006) 13 SCC 305, AIR 2014 SC 3798, (2009) 15 SCC 200, 1980 Cri.L.J. 564, 2015 Cri.L.J. 3422, AIR 2001 SC 318, AIR 1980 SC 1111, 2012 Part 3 SCC 64, (1996) 10 SCC 360, (2010) 9 SCC 567.

Ashish Gupta, for the appellant.
Anand Soni, for the respondent/SPE Lokayukt.

JUDGMENT

The Judgment of the Court was delivered by : **R.K. DUBEY, J. :-** This criminal appeal has been filed against the judgment dated 29.11.2014 passed by Special Sessions Judge (Prevention of Corruption Act), Dewas in Special S.T.No.7/2013, whereby the learned Judge has convicted the appellant under Section 7 of Prevention of Corruption Act and sentenced him to undergo three years RI with fine of Rs.2,000/- and under Section 13(2) of Prevention of Corruption Act and sentenced him to undergo three years RI with fine of Rs.2,000/- with default clause.

2. Brief facts are that on 10.5.2013 at about 11.00 AM complainant Hukum Patidar (PW3) gave a written complaint to the then SP, Lokayukt, Ujjain to the effect that his Eicher truck bearing registration No.MP-41- GA-0447 turned upside down at Dewas bus stand and on the basis of the same a case was registered at P.S.Kotwali, Dewas and in order to take the custody of the same, an application was filed by the complainant in the Court. In order to produce the case diary in the Court appellant demanded Rs.5,000/- as bribe. The complainant did not want to give bribe on the contrary he wanted appellant to be caught red-handed while accepting the bribe. On that complaint SP, Lokayukt verified the fact of allegation of the complainant, a conversation, which took place between the complainant and the appellant was recorded. The memory card on which the alleged conversation was recorded was kept by the Investigating Officer with him. Thereafter, the transcript of the alleged conversation was made, the same was read out to the witnesses and then it was signed by the concerning witnesses. Then, the Investigating Officer informed the SP, Lokayukta about the genuineness of the complaint and on the basis of the same, a letter was written to the Addl.Collector, Ujjain to send two

independent witnesses i.e.Dr.Ravindra Bharadwaj and Dr.Pradeep Lakhre(PW2) were sent. The said witnesses were introduced to the complainant. The contents of the complaint were read out to the complainant and the same were accepted by him. Then the contents of the memory card were played, in which the voice of the complainant and appellant was identified by the complainant. Three CDs of conversation as recorded in the memory card were also made. On the FIR Crime No.20/2013 for an offence under Section 7 of Prevention of Corruption Act was registered and for further registration it was sent to Bhopal. At Bhopal Crime No.122/2013 for an offences under Section 7 of Prevention of Corruption Act was registered. Then Inspector Basant Shrivastava asked the complainant to produce the currency notes which he intends to give as bribe and on the basis of that two notes of Rs.1,000/- each and six notes of Rs.500/- each were produced. Serial numbers of the currency notes were recorded and print-out of the same was also taken out. Thereafter, at the direction of Basant Shrivastava phenolphthalein powder was applied on the said currency notes by Constable Shriram Maske. A search of clothes of complainant was made and it was made sure that except bribe amount nothing remains in the possession of the complainant. Then, powder treated notes were kept in the left pocket of the shirt of the complainant by Shriram Maske. Complainant was explained by Basant Shrivastava that he should not touch the treated notes before handing over the appellant and the same should be given only when it is demanded by the appellant. He should also see as to where the treated notes are kept by the appellant. Complainant should also not shake his hand after parting with the bribe amount. A signal should also be made by him that he has handed over the amount.

3. Thereafter, complainant was explained about the procedure of phenolphthalein powder. Formalities of applying the powder and solution turning pink was followed. Necessary samples were also seized. Then, a trap party was formed and left for the spot at 14.30 and reached at 15.30. Complainant was sent to P.S., Kotwali, Dewas and was explained as to what is to be done by him, Constable who were supposed to catch hold the hands of the appellant were also asked to follow the complainant and as to where they have to stand. After some time complainant came and informed that appellant is not present in the Police Station. Then, complainant gave a call to the appellant on his mobile and complainant was asked to come and wait at Nema Kulfi. After waiting for sometime appellant came at Nema Kulfi,

complainant and appellant had some conversation and then after sometime complainant came out and gave the signal as explained. After receiving the necessary signal, trap party went inside and appellant was introduced with the raiding party.

4. Thereafter, the hands of the appellant were dipped in the solution of the sodium carbonate and the solution turned pink. The samples of the solution were seized in a bottle. Bribe amount was seized from the possession of the appellant. Numbers of the currency notes were matched with the list which was made earlier. Said notes were also seized. Pant of appellant from where the currency notes were seized was also recovered, shirt of the complainant in which bribe amount was kept was also seized. Spot map was drawn, arrest memo of the appellant was made, articles were sent to the FSL department, sanction to prosecute the appellant was procured, statements of the witnesses were recorded and after completing all the necessary and mandatory formalities, a charge sheet was filed by the respondent.

5. The appellant denied the charges framed by the trial Court for offences under Section 7 and 13(1)(d) read with13(2) of Prevention of Corruption Act and took the defence that complainant filed this complaint because he was annoyed with the appellant before the trap. Sub-Inspector Jabbar Khan (DW-1) had sent case diary before the Court and Court also ordered regarding custody of truck before the trap. He received the order for producing the case diary in Court on the eve of 9.5.2013 and he handed over the case diary on 10.05.13 to S.I., Jabbar Khan at 11.00 AM. The complainant knew that but still he called him at the Ice-cream shop and deliberately put tainted notes into his pocket and made a false case against him in connivance with the Officers of SPE Lokayukt, Ujjain. He also produced Jabbar Khan (DW-1), Jaya Tomar (DW-2) and Jitendra Sharma (DW-3) in his defence in this regard. But after trial the trial Court found appellant guilty under Section 7 and 13(1)(d) read with 13(2) of Prevention of Corruption Act and convicted him as aforesaid. Being aggrieved the appellant has filed this appeal.

6. Point of determination in this appeal is whether the conviction and sentence awarded by the trial Court against appellant under Section 7 and 13(2) of Prevention of Corruption Act are liable to be set aside for the reasons stated in the memo of appeal.

7. Learned counsel for the appellant submitted that learned trial Court

has erred in not appreciating the fact that there was no occasion for the appellant to demand money from the complainant because the case of the prosecution is that appellant demanded money from the complainant on the pretext of producing case diary in the Court so that complainant can take his vehicle on Supurdginama. While from the statement of complainant Hukum Singh (PW-3) and his father Pooran Singh (PW-7), Jabbar Khan (DW-1) and Jaya (DW-2) it is established in the case that when appellant came to know the fact that Court has called the case diary the same was sent by the appellant through Jabbar Khan (DW-1) at 11.00 AM before appellant was trapped in regard to the Supurdginama of said vehicle. So there was no reason for the appellant to demand money and also there was no occasion for the complainant to pay the bribe amount.

8. He further submitted that complainant Hukum Singh Patidar (PW-3) turned hostile and did not supported the prosecution story in this regard. He clearly denied from the fact that complainant demanded bribe from him. There is no other witnesses of the fact that appellant demanded bribe from the complainant. Even complainant Hukum Singh Patidar admitted that he himself forcibly put the money into the pocket of the appellant's trouser. Written complaint was also made by him at the instance of Investigating Officer Basant Shrivastava (PW8). Although, in the case a transcript of recorded conversation has been produced by the prosecution but bare perusal of the same also does not show even once that appellant demanded bribe. On the contrary, it was complainant, who was trying to put the words into the mouth of the appellant. This shows that appellant never intended to demand any money from the complainant. Even otherwise before relying on the alleged conversation, which was recorded by the respondent in memory card, it was the duty of the prosecution to fulfill the mandatory conditions of Section 65-B of the Evidence Act but in the case prosecution has not complied with the mandatory provisions of Section 65-B of the Evidence Act. So there is no evidence against the appellant that he demanded bribe from the complainant. But no heed was paid by the trial Court towards this fact. Prosecution has miserably failed to prove any demand of bribe amount at the end of the appellant. If the same is not proved then the recovery has no value in the eyes of the law. The trial Court committed mistake in holding that appellant demanded money from the complainant for a work to be done.

9. He also placed reliance on the judgment of Hon'ble Apex Court in the

case of *Subash Parbat Sonvane Vs. State of Gujrat,* reported in 2002(2) G.L.H.654, wherein Hon'ble Apex Court held that an act of obtaining demand on the part of the accused would be primary requisite merely acceptance of money but there was no evidence of demand, offence under Section 13(1)(d) of the Act is not made out and the Apex Court judgment passed in the case of *Krishan Chander Vs. State of Delhi,* reported in AIR 2016 SC 298, wherein Hon'ble Apex Court held that demand and acceptance of - Is sine qua non for constituting offence under Sections 7 and 13(1)(D). The Hon'ble Apex Court judgment passed in the case of *V. Venkata Subbarao Vs. State of Andhra Pradesh,* reported in (2006) 13 SCC 305, wherein Apex Court held that Prevention of Corruption Act, 1988 - S.20 - Presumption under, regarding acceptance of illegal gratification -Raising of - Prerequisite for - Held, the said presumption cannot be raised when demand by accused is not proved. The Apex Court judgment passed in *Satvir Singh Vs. State of Delhi thru. CBI,* reported in AIR 2014 SC 3798, wherein Apex Court held that Prevention of Corruption Act (49 of 1988), Ss.7, 13, 20 - Illegal gratification - Presumption - Appellant, Inspector, Customs allegedly demanded and accepted bribe of Rs. 2 Lakhs from complainant - Non-examination of brother of complainant who was present at time when complainant had telephonic conversation with appellant - There is no case of illegal gratification either demanded by appellant or paid to him by complainant - Presumption under section 20, not attracted - Therefore, question of onus of proof to disprove the presumption does not arise at all on part of appellant And also Apex Court judgment passed in the case of *State of Maharashtra Vs. Dnyaneshwar laxmanrao Wankhede,* reported in (2009) 15 SCC 200 wherein Apex Court held that Prevention of Corruption Act, 1988 - S.20 and Ss.7 & 13(1)(d)- Presumption where public servant accepts gratification other than legal remuneration - Burden of proof– Held, demand of illegal gratification is a sine quo (sic:qua) non for constitution of an offence under the provisions of the Act.

10. On the contrary learned counsel for the State submitted that the factum of demand and acceptance of bribe is proved by other evidence also and in this regard he also placed reliance on the Apex Court's judgment passed in *Hazari Lal Vs. State of Delhi,* 1980 Cri.L.J.564 in which Hon'ble Apex Court held that where the evidence of the Police Officer who laid the trap is found entirely trustworthy, there is no need to seek any corroboration. Recovery of money from accused - not sufficient to prove acceptance of bribe - recovery of money coupled with other circumstances leading to

circumstances that accused received gratification - presumption under Section 4(1) can be drawn and he also placed reliance on the Apex Court's judgment passed in *Nayankumar Shivappa Waghmare Vs. State of Maharashtra,* reported in 2015 Cri.L.J.3422, wherein it has been held that demand and acceptance - proved by raising presumption against accused alleged to have been demanded for clearing GPF and pension papers - payment of bribe money and its recovery by trap proved - but demand denied by complainant in cross-examination - nothing however on record to explain why complainant filed complaint when there was no demand and papers were being cleared on the date - clear case where presumption under Section 20 applies and Hon'ble Apex Court judgment passed in the case of *M.Narsinga Rao Vs. State of Andhra Pradesh* reported in AIR 2001 SC 318 wherein it held that acceptance of gratification - presumption- is compulsory and not discretionary - prosecution proved that accused received gratification from complainant - in circumstances Court can draw legal presumption that said gratification was accepted as reward for doing public duty.

11. It is clear from the above pronouncements of the Apex Court that for proving offence under Section 7 and 13(1)(d) of Prevention of Corruption Act both demand and acceptance need to be proved. But it can also be proved by the circumstantial evidence in the case where complainant turned hostile, or also by other oral documentary and circumstantial evidence and whether demand and acceptance is proved or not is a matter of fact, which has to be decided by evaluating the evidence produced before the Court in the case.

12. The Hon'ble Apex Court in its judgment passed in *Maharashtra Rajya Vs. Mohd.Yakub,* reported in AIR 1980 SC 1111, held that at the outset, it may be noted that the Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence act, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of 'proof' does not draw any distinction between circumstantial and other evidence. The Hon'ble Apex Court in the case of *Subramanyam Swami Vs. Manmohan Singh,* reported in 2012 Part 3 SCC 64, held that - Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very

foundation of Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our preambular vision. Therefore, the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say, in a situation where to constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it.

13. Although, in the case complainant Hukum Singh (PW-3) turned hostile and deposed in his statement that appellant did not demand bribe from him and he himself put the notes in accused's pocket and he also stated that he made a written complaint Ex.P/3 at the instance of Basant Shrivastava (PW-8), but even then the part of his statement which support the prosecution story can be relied on. In the case of *State of U.P. v. Ramesh Prasad Misra,* (1996) 10 SCC 360, it was held by the Supreme Court that:

> "It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

14. In the case of *C. Muniappan v. State of T.N.*, (2010) 9 SCC 567, the Supreme Court has similarly held that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

15. So the evidence of the hostile witness cannot be rejected merely because he has been declared hostile, and that the evidence of such a person does not become effaced from the record. The relevant portions of the evidence of a hostile witness can still be made use of in appropriate situations, at least to corroborate the evidence of other independent witnesses in material particulars, as held by the apex court.

16. Hukum Singh (PW-3) also deposed that on 8.6.2013 his truck bearing registration No.MP-41-GA-0447 turned upside down at Dewas, which was being driven by him at the time of accident. After accident the truck was

seized by the Police. His father, who owned the said truck, has filed an application to get custody of the said truck before the Court. Case diary of that crime was with appellant (Rajesh). He was willing to pay fine but truck was not released but Court called case diary. He talked with the appellant. The appellant told that it will take Rs.5,000/- towards fine and other expenses to get the vehicle released from the Court. His father asked why he would take Rs.5,000/- to get the truck released when all the papers were complete. His father took him to Lokayukta office Ujjain. Where he gave information orally. The officer of the Lokayukta office Ujjain told him to give the complaint in writing. On which he filed written report Ex.P/3. After filing complaint they called Panch witnesses and took Rs.5,000/- from him and put the powder on these notes and told him to give these notes to the appellant at Dewas. Thereafter, along with the team of Lokayukta, he alongwith his father came to Dewas, where his brother informed him on phone that though the challan has not been filed as yet, but the truck is going to be released at around 3.30 PM today. He phoned and asked appellant to come at Nema Kulfi shop. Even complainant Hukum Singh (PW-3), also admitted in his statement that who gave application Ex.P/3 to the Lokayukta office Ujjain mentioning that appellant was demanded Rs.5,000/- to produce case diary before the Court. He talked with the appellant on mobile phone from Office of Lokayukta that talk was also recorded by him.

17. Although, Hukum Singh (PW-3) stated that he made a written complaint Ex.P/3 at the instance of Basant Shrivastava (PW-8) but he also deposed that appellant told him that it will take Rs.5,000/- as fine and other expenses to get the vehicle released from the Court. His father asked why he would take Rs.5,000/- to get the truck released when all the papers were complete. He took him to Lokayukta office Ujjain where he gave information orally. The Officer of Lokayukta office Ujjain told him to give complaint in writing of which he filed report Ex.P/3, it shows that he himself voluntarily filed report Ex.P/3 which is also proved by Basant Shrivastava (PW8) in it clearly mentioned that appellant demanded money to produce case diary in the Court.

18. Had appellant not demanded bribe from Hukum Singh (PW-3) why he would lodge report Ex.P/3 against the appellant with S.P.Lokayukta Ujjain. Hukum Singh admitted that he talked with the appellant on mobile from office of Lokayukta that conversation was recorded by him. He also admitted to have signed Ex.P/4. Although, from the script it does not appear that appellant

demanded any bribe from Hukum Singh but that transcript clearly show that complainant offered to give him money in return for getting job done. From that conversation appellant, who is Police officer, should have got clear indication that complainant offering him a bribe. Even then he did not explicitly decline to it. On the contrary after the conversation he went to Kulfi shop on complainant's request as he admitted in his examination under Section 313 Cr.P.C. while it is not the defence of appellant that he had any previous relation or friendship with the complainant.

19. Although, learned counsel for the appellant submitted that prosecution has not complied with the mandatory provisions of Section 65-B of Evidence Act to prove the conversation but his argument has no force. Ashok Khatri (PW-4) clearly deposed that on 10.5.2013 he made a transcript Ex.D/4 and also made three CDs of conversation recorded in memory card Article A and prosecution also filed certificate Ex.P/73 in this regard, which is proved by Basant Shrivastava (PW-8).

20. Hukum Singh (PW-3) also deposed that appellant told him that it will take Rs.5,000/- as fine and other expenses to get the vehicle released from the Court but it appears from the Ex.P/1 to P/33 and Ex.D/1 to D/2 that the offence was registered against the complainant under Section 279, 337 of IPC in which maximum fine prescribed is Rs.1000/- and Rs.500/- respectively. While appellant told Hukum Singh that it will get Rs.5,000/- to release the vehicle from the Court. All circumstances show that appellant demanded bribe from the complainant.

21. Likewise Hukum Singh (PW-3) deposed that at the Kulfi shop he himself put the tainted money in the pocket of appellant and appellant also took that defence and also produced Jitendra Sharma (DW-3) on that point. But statement of Jitendra Sharma (DW-3) appears to be afterthought because appellant did not give any suggestion to Hukum Singh (PW-3). Dr.Pradeep Lakhre (PW-2), Halke Prasad (PW-5), Basant Shrivastava (PW-8), stated that Jitendra Sharma (DW-3) was present at the time of trap on the spot. On the contrary from the statement of independent witnesses Pradeep Lakhre (PW-2), Halke Prasad (PW-5) and Basant Shrivastava (PW-8) it is clearly proved that when members of trap party at Kulfi shop got his hands dipped in the solution of sodium carbonate, the colour of solution turned pink. If appellant had not taken tainted money in his hands from Hukum Singh and Hukum Singh had himself put that tainted money directly in the pocket of appellant

then why would solution turn pink.

22. Although, learned counsel for the appellant submitted that complainant Hukum Singh himself admitted that he had shaken hands with the appellant so only on the basis of the fact that solution turned pink it cannot be assumed that appellant took money in his hands from Hukum Singh. But this contention has also no force because Hukum Singh deposed in para 11 of his statement that he had shaken hands before putting tainted money in his pocket. No public servant would allow anybody to put anything in his pocket, specially to a person who is an accused in the crime, which is being investigated by him. So otherwise also this defence is not tenable.

23. Although, it appeared from the statement of Hukum Singh (PW-3), Pooran Singh (PW-7), Jabbar Khan (DW-1) and Jaya (DW-2) that before the trap the case diary of Crime No.581/2013 registered at P.S., Dewas against the accused/appellant had been put before the Court. But bribe can be taken even after completion of the task. Even otherwise Hukum Singh (PW-3) deposed in his statement that when he reached at Dewas his brother informed on phone that though charge sheet has not been filed yet but the truck is going to be released at 3.30 PM. He asked the complainant to come at Nema Kulfi shop and offered money for producing case diary, it shows that even after filing of case diary before the Court task of filing charge sheet before the Court was still pending with the applicant. So the defence of the appellant that at the time of trap there was no reason for him to demand money from the complainant does stand.

24. From a part of the statement of complainant Hukum Singh (PW-3) which is also corroborated from the evidence of other independent witnesses Pradeep Lakhre (PW-2), Ashok Khatri (PW-4) and Basant Shrivastava (PW-8) in material particulars and other circumstantial evidence as discussed above. It is proved that appellant demanded bribe from complainant Hukum Singh (PW-3) and from the statement of Hukum Singh (PW-3) Pradeep Lakhre (PW-2), Halke Prasad (PW-5), Basant Shrivastava (PW-8) it is also clearly proved that the raiding party reached the spot and proceeded for laying of trap, the complainant went to the appellant and handed over the bribe money. On receiving the signal, raiding party arrived at the spot and recovered the tainted currency notes from the pocket of his trouser. The solution of sodium carbonate was prepared with which hands of appellant were washed and solution turned pink. Same test was repeated with the currency notes and

pocket of the trouser and each time sodium solution turned pink. The wash exhibits were sent for FSL report. The testimonies of Pradeep Lakhre (PW-2), Halke Prasad (PW-5), Basant Shrivastava (PW-8) also clearly prove the recovery of currency notes from the possession of the appellant. The FSL report of hand wash, trouser wash and note wash clearly indicates the recovery of bribe money. The ocular testimony of prosecution witnesses has been duly corroborated by the documentary evidence.

25. So far as the proposition of law laid down in judgments cited by learned counsel for the appellant is concerned, the same is not applicable to the facts of the present case as the basic ingredients i.e. demand of bribe, its acceptance and recovery of currency notes, required for holding the appellant guilty under Section 7 and 13 of the Act, stand duly proved beyond shadow of reasonable doubt. The judgments cited by learned counsel for the appellant are based on the facts of the individual cases.

26. The explanation given by the appellant as regards to the recovery that complainant Hukumchand put the tainted notes in his pocket does not appear to be correct. On the contrary there are adequate circumstances which establish the ingredients of the offences in respect of which he was charged.

27. Therefore, from the above facts, legitimately a presumption can be drawn that the accused-appellant had received or accepted the said currency notes on his own volition. The factum of presumption and the testimony of prosecution witness go long way to show that the prosecution has been able to prove demand, acceptance and recovery of the amount. Hence, we are inclined to hold that the learned trial Judge has appositely concluded that the charges leveled against the accused have duly been proven by the prosecution.

28. So in the considered opinion of this Court the trial Court has not committed any mistake to convict the appellant under Section 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act and stand duly proved beyond shadow of reasonable doubt.

29. As far as sentence is concerned the learned Judge has sentenced appellant under Section 7 of Prevention of Corruption Act to undergo three years RI with fine of Rs.2,000/- and under Section 13(2) of Prevention of Corruption Act to undergo three years RI with fine of Rs.2,000/- with default clause which also can not be said to be in excess so that also is hereby affirmed.

30. In the ultimate analysis we find no merit in the appeal and consequently the same stands dismissed. As the appellant is on bail his bail bonds stands forfeited and he be taken into custody to suffer the remaining Jail sentence.

The appeal is disposed of accordingly.

Appeal dismissed.

I.L.R. [2017] M.P., 937
CIVIL REVISION
Before Mr. Justice Sheel Nagu
C.R. No. 50/2006 (Gwalior) decided on 30 August, 2016

VIJAY KUMAR & anr. ...Applicants
Vs.
M/S SHRIRAM INDUSTRIES & ors. ...Non-applicants

A. Civil Procedure Code (5 of 1908), Order 30 Rule 1 and Partnership Act, (9 of 1932), Section 69(2) – Maintainability of Suit – **Respondent/plaintiff firm filed a recovery suit represented by its two partners against the petitioners – Out of two partners, one partner was not a registered partner – Held – Section 69(2) of the Act of 1932 prohibits institution of suit filed by a partnership firm or the partners against a third party unless atleast two qualified partners (whose names are mentioned in registration certificate of partnership firm) represent the plaintiff partnership firm – In the present case, institution of suit by only one qualified partner runs contrary to the mandatory provisions of Section 69(2) of the Act – Suit not maintainable and is accordingly dismissed – Revision allowed. (Para 10 & 12)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 30 नियम 1 एवं भागीदारी अधिनियम, (1932 का 9), धारा 69(2) – वाद की पोषणीयता – प्रत्यर्थी/वादी फर्म ने याचीगण के विरूद्ध एक वसूली वाद प्रस्तुत किया जिसका प्रतिनिधित्व उसके दो भागीदारों द्वारा किया गया – दोनों भागीदारों में से एक रजिस्ट्रीकृत भागीदार नहीं था – अभिनिर्धारित – 1932 के अधिनियम की धारा 69(2), एक भागीदारी फर्म या भागीदारों द्वारा तीसरे पक्षकार के विरूद्ध वाद संस्थित किया जाना प्रतिषिद्ध करती है जब तक कि कम से कम दो अर्हित भागीदार (जिनके नाम भागीदारी फर्म के रजिस्ट्री प्रमाण–पत्र में उल्लिखित हों) भागीदारी फर्म का प्रतिनिधित्व नहीं करते – वर्तमान प्रकरण में, केवल एक अर्हित भागीदार द्वारा वाद का संस्थित किया जाना, अधिनियम की धारा 69(2) के आज्ञापक उपबंधों के विपरीत जाता है – वाद पोषणीय नहीं एवं तद्नुसार खारिज – पुनरीक्षण मंजूर।

B. ***Practice and Procedure*** **– Although there is no occasion of any clash or contradiction between the provisions of Section 69(2) of the Partnership Act, 1932 and Order 30 of the Civil Procedure Code, it is settled law that special enactment prevails upon the general law – The law relating to procedure gives way to substantive provisions of law – Provisions of Partnership Act shall supersede upon the provisions of Civil Procedure Code. (Para 8 & 9)**

ख. पद्धति एवं प्रक्रिया – यद्यपि भागीदारी अधिनियम, 1932 की धारा 69(2) एवं सिविल प्रक्रिया संहिता के आदेश 30 के उपबंधों में कोई टकराव या विरोधाभास का अवसर नहीं है, यह एक सुस्थापित विधि है कि विशेष अधिनियमिति, सामान्य विधि पर अधिभावी होती है – प्रक्रिया से संबंधित विधि, विधि के सारभूत उपबंधों को रास्ता देती है – भागीदारी अधिनियम के उपबंध सिविल प्रक्रिया संहिता के उपबंधों पर अधिष्ठित होंगें।

Cases referred:

AIR 1989 SC 1769, AIR 1987 Bombay 348, AIR 1963 (MP) 37, AIR 1966 SC 135, (1999) 7 SCC 76, (1999) 9 SCC 620, (2008) 3 SCC 674.

N.K. Gupta with *S.D. Singh,* for the applicants.
Sanjeev Jain, for the non-applicants.

ORDER

SHEEL NAGU, J. :- The present revision filed under Section 115 of the Code of Civil Procedure, assails the interlocutory order dated 20/2/2006 in C.S.No.15-A/99 passed by the District Judge, Morena (M.P.) by which an application seeking dismissal of the suit filed by the plaintiffs partnership firm represented by two partners against a third party on the ground of same being hit by the mandatory provision of Sections 69(2) of the Indian Partnership Act, 1932, (in short the Act) has been rejected.

2. Learned counsel for the rival parties are heard.

3. Brief facts giving rise to the present dispute are that the partnership firm in the name and style of M/s Shriram Industries represented through Mahila Krishnakumari and Daudayal, instituted a suit by filing a plaint praying for recovery of amount of Rs. 10,66740/- alongwith interest against another firm, namely, Shyamsunder & Company represented through its partners. During

pendency of the suit, at preliminary stage, an application for dismissal of the suit was filed by the defendants contending that the suit being not maintainable under Section 69(2) of the Act inasmuch as that the same was though instituted by a registered partnership firm M/s Shriram Industries but was not represented through two partners both of whose names find place in the Register of partnership maintained by the Registrar of Partnership under the Act. It was though admitted that Mahila Krishnakumari was a partner of the plaintiffs-firm, who is a registered partner but objection was raised in regard to name of Daudayal s/o Shri Kanhaiyalal who was mentioned as one of the partners representing the plaintiffs/firm. It was submitted that Daudayal was inducted as partner in place of his deceased-father Kanhaiyalal. However, name of Daudayal was not mentioned in the registration certificate of plaintiff partnership firm. In this factual background, the defendants placing reliance on the provisions of Section 69(2) of the Partnership Act read with XXX of C.P.C. sought dismissal of the suit represented by only one registered partner, as not maintainable.

4. The trial court while holding the suit to be maintainable has held that provisions of Section 69(2) of the Act come into play only when a new partner is inducted without his name being mentioned in the registration certificate and not in the situation prevailing herein where the son of the erstwhile registered partner had merely replaced his deceased father who was a registered partner. In respect of the objection pertaining to provisions of Order XXX Rule 2 of C.P.C., the trial court held that the suit can survive even if one of the registered partners arrayed in the plaint, representing the plaintiff partnership firm signs and verifies the plaint.

5. The undisputed facts in the present case are that:-

(i) The suit in question was instituted by a registered partnership firm represented through two persons namely, Mahila Krishnakumari, who indisputably was a registered partner and Daudayal who was though admitted as a partner but his name did not figure in the Registration Certificate.

(ii) The plaint appears to have been singed and verified by both the said partners.

6. For resolving the controversy, the relevant statutory provisions deserve to be reproduced below:-

"69.Effect of non-registration. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

ORDER XXX Rule 1 CPC

1."Suing of partners in name of firm"

(1) Any two or more persons claiming or being liable as partners and carrying on business in, India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice such pleading or other document is signed, verified or certified by any one of such persons.

6.1 It appears that section 69 of the Act which relates to the effect of non-registration reflects that the said provision concerns two classes of suits. The first as described in section 69(1) of the Act is a suit filed by any person suing as a partner in the firm against the same firm or any partner of the same firm, whereas the other class under section 69(2) of the Act is the one filed by or on

behalf of a firm against any third party.

6.2. The suit in question is against a third party and is thus relatable to section 69(2) of the Act.

6.3 Both sub-sections of section 69 of the Act are couched in negative language which is reflected from use of prohibitive phrase ,i.e. "No suit to enforce a right....."

6.4 More so, both sub-sections of section 69 of the Act prohibit institution of suit unless plaintiff-firm is registered under the Act or plaintiff-partner is a registered partner of the firm.

6.5 A close scrutiny of section 69(2) of the Act further reveals that while making it mandatory for the plaintiff partnership firm and the partners representing the said firm to be registered, the term **"persons"** and not 'person' has been employed. This reveals the legislative intent that the plaintiff-partner should be more than one in number. Meaning thereby that the plaintiff firm should be represented by at least two or more partners and both the said partners should be registered partners.

6.6 The object behind using the term "persons" in plural is explicitly clear. A partnership comes into being only when two or more persons agree to share profits of business carrying on by them or any of them under the Act. Thus, the very genesis of partnership is based on plurality and not singularity.

6.7 The object behind this use of plural term of "persons" is to ensure that at least two persons, which is the bare minimum requirement for formation of partnership firm to become plaintiffs to enable institution of a suit by them or through them and thereby save the suit from being hit by the prohibitory mandatory provisions of section 69(2) of the Act.

6.8 As regards Order XXX Rule 1 of C.P.C., is concerned, the same relates to the field of procedure and provides that any two or more persons claiming or being liable as partners and carrying on business, may sue in the name of the firm and any one of them should sign and verify the plaint.

6.9 This procedural arrangement made in the CPC also contemplates two or more person, which is again based on the same concept of plurality of persons necessary for partnership to be born.

6.10 Coming to the judicial pronouncements on the issue involved herein

and the legal provisions, the first and foremost decision is of the Apex Court in the case of *M/s Shreeram Finance Corporation Vs. Yasin Khan & others* (AIR 1989 SC 1769). In this case the Apex court upholding the order of the High Court and the trial court dismissing the suit filed by the partners as not maintainable held thus:-

> "6. In the present case the suit filed by the appellants is clearly hit by the provisions of sub-section (2) of section 69 of the said Partnership Act, as on the date when the suit was filed, two of the partners shown as partners as per the relevant entries in the Register of Firms were not, in fact, partners, one new partner had come in and two minors had been admitted to the benefit of the partnership firm regard- ing which no notice was given to the Registrar of Firms. Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of Firms. The result is that the suit was not maintainable in view of the provisions of sub-section (2) of section 69 of the said Partnership Act and the view taken by the Trial Court and confirmed by the High Court in this connection is correct. Although the plaint was amended on a later date that cannot save the suit. Reference has been made to some decisions in the judgment of the Trial Court; however, we do not find it necessary to refer to any of them as the position in law, in our opinion, is clear on a plain reading of sub-section (2) of section 69 of the said Partnership Act."

6.11 In the above said case before the Supreme Court the issue primarily was whether a suit by a person who is not a registered partner is maintainable. The answer to the question was in "Negative". However, whether the partnership suit representing through only one of the registered partners against a third party can pass the test laid down under Section 69(2) of the Act or not was not considered by the Apex Court.

6.12 Next case is the Division Bench decision of Bombay High Court reported in AIR 1987 Bombay 348 *(Gandhi & Co. Vs. Krishna Glass Pvt. Ltd.)* where in the considered opinion of this court, the issue involved in regard to the singularity or plurality of the partners in filing suit in the name of partnership firm against a third party was considered. The relevant extracts of the said decision are reproduced below:-

10. The learned Judge in that case dissented from the view of the Calcutta High Court in (1962) 66 Cal WN 262 where the contention that the word ' and ' in S.69(2) be read as 'or' was rejected. As discussed earlier, the scope and ambit of the provisions of Rr.1 and 2 of O.30 of the Civil P.C. is different from the provisions of S.69(2) of the Partnership Act. The provisions contained in Rr.1 and 2 are procedural; whereas the provisions of S.69(2) are substantive and crate a bar at the threshold of the filing of suit by or on behalf of a firm, if the conditions mentioned therein are not fulfilled. S.69(2) says that "no suit shall be instituted ..... by or on behalf of a firm ..... unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm." On a plain reading of the Section both the conditions laid down in the Section must be fulfilled and that is clear from the fact that the word 'and' is used and appears in the Section. We have already indicated that even if a suit is filed in the name of a firm it is in substance a suit by the partners of the firm and the phrase 'the persons suing' therefore, will have to be construed as the names of all the partners constituting the firm, at the time of the institution of the suit. In our opinion, the expression 'persons suing' can only mean the persons who file the suit on behalf of the firm. If this is the construction which requires to be adopted on the said phrase used in the provision it would logically follow that the word 'and' cannot be construed distinctively, as suggested by the learned counsel. It is well settled rule of construction of a statutory provision that unless there is ambiguity or that two constructions are possible, the normal rule of giving a plain meaning to the words used has to be followed. We find that the provisions of S.69(2) are clear and unambiguous and there is no scope for giving a different meaning to the word 'and'. We, therefore, reject the argument that if the suit is filed in the name of the firm all that is required to be shown is that the firm is registered on the date of the suit and the second condition relating to the names of the persons being shown as partners in the Register of Firms does not apply to such a suit. The question of the applicability of the

provision of Rr. 1 and 2 of O. 30 of the Code arises only if the suit itself is validly instituted in compliance with the provisions of S.69(2) and not otherwise. These provisions of the Code, therefore, cannot be of any assistance in interpreting the provisions of S.69(2).

19. In the present case it is established that the name of the partner, Rasiklal N. Gandhi had not been shown in the Register of the Firms on the date of the filing of the suit. The suit filed by the partnership firm must, therefore, fail."

7. Learned counsel for the respondents after placing reliance on the Division Bench decision of this court in the case of *Firm Gopal Company Ltd. Bhopal & another Vs Firm Hazarilal Company, Bhopal* [AIR 1963 (MP) 37] contends that even a single registered partner (Mahila Krishna kumari as in the present case) representing the firm can save the suit from being dismissed under Section 69(2) of the Act.

7.1 A perusal of the said Division Bench decision of this court reveals that though this court took into account provisions of Order XXX Rule 1 of C.P.C., but the provisions of section 69 of the Act were not taken into consideration. Thus, this decision is of no avail herein.

8. The maintainability of the suit filed by partner or partnership firm against another partner or partnership firm or against a third party, can be tested only on the anvil of section 69 (2) of the Act, which is substantive law relating to partnership firm. The provision of order XXX of C.P.C., merely lays down procedure and cannot override the substantive special enactment on the subject which is the Partnership Act. This emanates out of the maxim *generalia specialibus non derogant,* which has been reiterated in various decisions of the Apex court in the cases of *Damji Valji Shah Vs. LIC of India* (AIR 1966 SC 135), *Gobind Sugar Mills Ltd. Vs State of Bihar* (1999) 7 SCC 76, *Belsund Sugar Co.Ltd. Vs. State of Bihar* (1999) 9 SCC 620 including the case of *Suresh Nanda Vs. Central Bureau of Investigation* reported in (2008) 3 SCC 674.

9. Anything contained in the C.P.C. on the issue which is contrary to the provision of the special law i.e., Partnership Act shall stand superseded and the said enactment will prevail upon general law which is C.P.C. It is settled principle of law that special enactment prevails upon the general law and also

that the law relating to procedure gives way to substantive provisions of law.

10. Testing the factual matrix attending the present case on the anvil of the law laid down in various decisions supra, it is crystal clear that Section 69 of the Act prohibits institution of a suit filed by a partnership firm or the partners against a third party (as in the case herein) unless at least two qualified partners represent the plaintiff partnership firm. Qualified partners would means partners whose names are mentioned in the registration certificate of the partnership firm.

11. Before concluding it would be appropriate to mention that provisions of Order XXX of C.P.C., in fact furthers the intent and object of section 69(2) of the Act. Section 69 (2) in mandatory term requires at least two or more qualified partners to represent the partnership firm instituting the suit against a third party. While in similar tenor, the provision of Order XXX Rule 1 of C.P.C., which is enabling in nature provides that two or more partners may sue or be sued in the name of the firm provided they are partners of the firm in question at the time of accruing of the cause of action. Thus, there is no occasion of any clash or contradiction between the provisions of section 69(2) of the Act and Order XXX of C.P.C.

12. In the present case, undoubtedly the second partner Daudayal representing the plaintiff partnership firm was not a qualified partner under the Act inasmuch as his name was not mentioned in the partnership registration certificate. That renders the suit in question to be instituted through sole qualified partner, i.e., Mahila Krishnakumari. Institution of such suit by only one partner runs contrary to the mandatory provisions of section 69(2) of the Act.

13. In view of above discussions on the factual and legal aspects of the matter, this court has no hesitation to hold that C.S.No.15-A/1999 (M/s Shreram Industries Vs. Firm Shyamsunder & Company) filed by one of the qualified partners, namely, Mahila Krishnakumari was not maintainable.

14. Accordingly, the trial court failed to exercise the jurisdiction vested in it by rejecting the application filed by the defendants.

15. In the result, civil revision stands allowed. The impugned order dated 20/2/2006 in C.S.No.15-A/99 passed by the District Judge, Morena (M.P.) is set aside and the suit in question is held to be not maintainable and is dismissed as such.

16. Let a copy of this order be sent to the trial court for information.

Revision allowed.

I.L.R. [2017] M.P., 946
CRIMINAL REVISION
Before Mr. Justice S.K. Palo
Cr.R. No. 1102/2016 (Jabalpur) decided on 9 August, 2016

KARAMJEET SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 475, Army Act (45 of 1950), Section 125 & 126 and Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, Rule 3 & 4 – **Trial of an accused liable to be tried by Court-martial or by a Competent Criminal Court – When the accused is an army man – The criminal Court before proceeding should give notice to the Commanding Officer of accused as envisaged u/S 125 & 126 of the Army Act. (Para 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 475, सेना अधिनियम (1950 का 45), धारा 125 व 126 एवं दण्ड न्यायालय और सेना न्यायालय (अधिकारिता का समायोजन) नियम, 1952, नियम 3 व 4 – सेना न्यायालय या सक्षम दण्ड न्यायालय के द्वारा विचारण योग्य अभियुक्त का विचारण – जब अभियुक्त एक सैनिक है – दण्ड न्यायालय को आगे कार्यवाही करने से पूर्व अभियुक्त के कमान अधिकारी को नोटिस देना चाहिए जैसा कि सेना अधिनियम की धारा 125 व 126 के अंतर्गत परिकल्पित है।

B. Army Act (45 of 1950), Section 125 & 126 and Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, Rule 3 & 4 – Nature of – **Held – Are mandatory and the effect of non-compliance thereof is that the entire exercise would be vitiated and held to be null and void. (Para 10)**

ख. सेना अधिनियम (1950 का 45), धारा 125 व 126 एवं दण्ड न्यायालय और सेना न्यायालय (अधिकारिता का समायोजन) नियम, 1952, नियम 3 व 4 – का स्वरूप – अभिनिर्धारित – आज्ञापक है तथा उसके अननुपालन का प्रभाव यह है कि संपूर्ण कार्यवाही दूषित हो जाएगी तथा अकृत एवं शून्य ठहरायी जाएगी।

C. Army Act (45 of 1950), Section 125 & 126 and Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952,

Rule 3 & 4 – Trial of offence **– Accused army man – Criminal Court and Court-martial both have concurrent jurisdiction – If the criminal Court is of the opinion that proceedings be instituted before itself, the procedure before proceeding with the trial is that notice as provided u/ S 125 & 126 of the Army Act to Commanding Officer is required to be issued – It is a mandatory requirement – Non-compliance of which vitiates the entire exercise and proceedings will be held to be *null and void.*** **(Para 9 & 10)**

ग. सेना अधिनियम (1950 का 45), धारा 125 व 126 एवं दण्ड न्यायालय और सेना न्यायालय (अधिकारिता का समायोजन) नियम, 1952, नियम 3 व 4 – अपराध का विचारण – अभियुक्त सैनिक – दण्ड न्यायालय एवं सेना न्यायालय दोनों के पास समवर्ती अधिकारिता है – यदि दण्ड न्यायालय इस मत का है कि कार्यवाहियाँ उसके समक्ष संस्थित हो, विचारण पर आगे बढ़ने के पूर्व प्रक्रिया यह है कि कमान अधिकारी को नोटिस जैसा कि सेना अधिनियम की धारा 125 एवं 126 के अंतर्गत उपबंधित है, जारी किया जाना अपेक्षित है – यह एक आज्ञापक अपेक्षा है – जिसका अननुपालन संपूर्ण कार्यवाही को दूषित करेगा तथा कार्यवाहियाँ *अकृत एवं शून्य* ठहरायी जाएगी।

Cases referred:

(1972) 2 SCC 692, 2001 (1) MPHT 72, Cr.L.R. (SC) 1986 Page 309.

G.S. Ahluwalia, for the applicant.
Surabhi Nigam, Deputy G.A. for the non-applicant/State.

ORDER

S.K. Palo, J. :- Heard.

This revision under Section 397 read with Section 401 of the Code of Criminal Procedure has been preferred against the order dated 13.4.2016 passed by 18th Additional Sessions Judge, Jabalpur in Special Case No.207/ 2010 whereby learned Additional Sessions Judge refused to allow the application filed by the petitioner under Section 125 and 126 of the Army Act, 1950.

2. Filtering unnecessary details, the facts requisite for disposal of this revision, are that allegedly the petitioner served in Indian Army as a soldier on the basis of forged mark-sheet, therefore, FIR was lodged by Army and proceeding has been initiated by police for offence under Sections 420, 467,

468 and 471 of the Indian Penal Code. After filing of the charge-sheet, trial is in progress before learned Additional Sessions Judge, Jabalpur. Referring Sections 125 and 126 of the Army Act, 1950 the petitioner filed an application requesting the learned Additional Sessions Judge to drop the proceeding on the ground that no intimation was given to the Commanding Officer as required under Sections 125 and 126 of the Army Act, 1950. Learned Additional Sessions Judge vide impugned order dated 13.4.2016 dismissed the same stating that the petitioner is no more in Army services and, therefore, Sections 125 and 126 are not attracted in the present case, and the petitioner did not file the application at preliminary stage and filed the same at the stage of defence evidence.

3. Learned counsel for the petitioner argued that if the provisions of Sections 125 and 126 of the Army Act, 1950 are not complied with, it goes to the root of the case and the trial would be vitiated. He has placed reliance on the decisions rendered in *Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya,* (1972) 2 SCC 692, and *Captain P.K. Rekwal v. State of M.P.,* 2001 (1) MPHT 72 in support of his contentions.

4. Learned Deputy Government Advocate has opposed the contentions raised by the learned counsel for the petitioner and submitted that the order impugned is well merited and does not call for any interference.

5. Having heard learned counsel for the parties and perusing the record, it is found that criminal trial is pending before 18th Additional Sessions Judge for offences punishable under Sections 420, 467, 468 and 471 of the Indian Penal Code for allegedly entering into Army service by the petitioner with the help of forged mark-sheets.

6. For better understanding of the provisions, Sections 125 and 126 of the Army Act, 1950 are reproduced below:

> "125. **Choice between criminal court and court-martial.-** When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which Court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial,

to direct that the accused person shall be detained in military custody.

126. **Power of criminal court to require delivery of offender.** - (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In very such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final."

Plain reading of the aforesaid provisions shows that Criminal Court having jurisdiction is, of the opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice require the officer referred to in section 125 of his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law and to postpone proceedings pending a reference to the Central Government.

7. In the case of *Lt. Col. S.K. Loraiya* (supra) in paragraph 9 the Supreme Court has held as under:

"9. As regards the trial of offences committed by army men, the Army Act draws a threefold scheme. Certain offences enumerated in the Army Act are exclusively triable by a Court-martial; certain other offences are triable both the ordinary criminal court and the court-martial. In respect of the last category both the courts have concurrent jurisdiction. Section 549 (1) Cr.P.C. is designed to avoid the conflict of jurisdiction in respect of the last category of offences. The clause "for which he is liable to be tried either by theCourt to which this Code applies or by a court martial " in our view, qualifies the preceding clause " when any person is charged with an offence

"in Section 549 (1). Accordingly, the phrase" is liable to be tried either by a court to which this Code applies or a court-martial" imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal court as well as a court-martial. In our opinion, the phrase is intended to refer to the initial jurisdiction of the two courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary criminal court and the court-martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, section 549 and the rules made thereunder are attracted to the case at hand."

8. This Court in earlier judgment in the case of *Captain P.K. Rekwal* (supra) has held as under:

"....Under Section 475 of the Code rules consistent with Cr.P.C. And Army Act may be framed and Magistrate shall have regard to such Rules. If ordinary criminal Court decides to try accused who is subject to Army Act, it will have to give notice to the Army authorities as per mandatory provision in Sections 125 and 126 of the Act and Rules 3 and 4 of the Rules, 1952 - As mandatory procedure has not been followed the trial against the petitioners is vitiated. - The impugned order framing charges against the petitioners is quashed and proceedings stayed."

9. In this regard Rules 3 and 4 of the Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952 are felt necessary to be also reproduced below:

"3. Where a person subject to Military, Navel or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by Court- Martial, such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless-

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent Military,

Naval or Air Force authority, or

(b) he is moved thereto by such authority.

4. Before proceeding under clause (a) of Rule 3, the Magistrate shall give a written notice to the Commanding Officer of the accused and until the expiry of a period of -

(i) three weeks, in the case of a notice given to a Commanding Officer in command of a unit or detachment located in any of the following areas of the hill districts of the State of Assam, that is to say-

(1) Mizo,

(2) Naga Hills,

(3) Garo Hills,

(4) Khasi and Jaintia Hills, and

(5) North Cachar Hills;

(ii) seven days, in the case of a notice given to any other Commanding Officer in command of a unit or detachment located elsewhere in India, from the date of the service of such notice, he shall not-

(a) convict or acquit the accused under Sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), or hear in his defence under Section 244 of the said Code; or

(b) frame in writing a charge against the accused under Section 254 of the said Code; or

(c) make an order committing the accused for trial by the High Court or the Court of Sessions under Section 213 of the said Code; or

(d) transfer the case for inquiry or trial under Section 192 of the said Code"

Under these rules framed by the Central Government, where a person

subject to Military, Naval or Air Force law, the Magistrate shall have regard to such Rules. Combined reading of the above rules and provisions of Sections 125 and 126 of the Army Act, 1950, provides that accused is subject to Army Act, the criminal court before proceeding against him will have to give notice to the Commanding Officer of the accused as envisaged under Sections 125 and 126 of the Army Act.

10. Compliance of the aforesaid procedure prescribed by the above Rules is mandatory requirement. The words used in Sections 126 *"when a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence"* means that before proceeding with the criminal trial, the additional sessions Judge ought to have followed this provision. In the proceeding undertaken by learned Additional Sessions Judge, without compliance of the aforesaid mandatory provision is vitiated and entire exercise would be null and void as has been held by the Supreme Court in the case of *Superintendent and Rememberance of Legal Affairs, West Bengal v. Usha Ranjan Roy Choudhary,* Cr.L.R. (SC) 1986 page 309.

11. In view of the above legal and factual position, this Court is of the opinion that the aforesaid provisions and law have not been followed in the present case and, therefore, the trial against the petitioner will render vitiated. This petition is therefore, **allowed.** Setting aside the impugned order dated 13.4.2016. It is directed that learned 18th Additional Sessions Judge, Jabalpur shall follow the above provision and if the competent authority of the Army decides that trial be conducted by ordinary criminal Court, then proceed against the accused from the stage of framing of charge.

Revision allowed.

I.L.R. [2017] M.P., 952
CRIMINAL REVISION
Before Mr. Justice S.K. Palo
Cr.R. No. 2239/2015 (Jabalpur) decided on 22 August, 2016

RAM MILAN DUBEY & ors. ...Applicants
Vs.
KU. VANDANA JAIN & anr. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 321, Legal Services Authorities Act (39 of 1987), Section 20 and Penal Code

(45 of 1860), Sections 294, 506 & 323/34 – Lok-Adalat – **Whether powers u/S 321 of Cr.P.C. can be exercised by the Lok-Adalat for withdrawal of prosecution by the State Government – Held – No, the powers u/S 321 of Cr.P.C. cannot be exercised by the Lok-Adalat for withdrawal of prosecution, as the power u/S 321 of Cr.P.C. can only be exercised by the regular Court after examining the merits of the case – Revision dismissed.** **(Para 19)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321, विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धारा 20 एवं दण्ड संहिता (1860 का 45), धारा 294, 506 व 323/34 – लोक अदालत – क्या राज्य सरकार द्वारा अभियोजन वापस लेने के लिए दण्ड प्रक्रिया संहिता की धारा 321 के अंतर्गत शक्तियों का प्रयोग लोक अदालत द्वारा किया जा सकता है – अभिनिर्धारित – नहीं, लोक अदालत द्वारा अभियोजन वापस लेने हेतु दण्ड प्रक्रिया संहिता की धारा 321 के अंतर्गत शक्तियों का प्रयोग नहीं किया जा सकता चूंकि, दण्ड प्रक्रिया संहिता की धारा 321 के अंतर्गत शक्तियों का प्रयोग केवल नियमित न्यायालय द्वारा प्रकरण के गुणदोषों का परीक्षण करने के पश्चात् ही किया जा सकता है – पुनरीक्षण खारिज।

B. Legal Services Authorities Act (39 of 1987), Section 20 – Lok-Adalat – "Compromise" or "Settlement" – **Powers of disposal of cases by the Lok Adalat relates to only settlement between parties through compromise and no case can be disposed of without compromise or settlement between the parties.** **(Para 20)**

ख. विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धारा 20 – लोक अदालत – "समझौता" या "निपटारा" – लोक अदालत द्वारा प्रकरणों के निराकरण की शक्तियों का प्रयोग केवल पक्षकारों के मध्य समझौते के जरिए निपटाने से संबंधित है तथा कोई भी प्रकरण पक्षकारों के मध्य "समझौता" या "निपटारे" के बिना निराकृत नहीं किया जा सकता।

Cases referred:

2007 (1) M.P. Weekly Note, 113, (2008) 2 SCC 660, (2005) 6 SCC 478, AIR 1957 SC 389.

Ashish Shroti, for the applicants.
A.R.S. Chauhan, P.L. for the non-applicant No. 2/State.
Dharam Raj Singh Chaudhary, for the non-applicant No. 1.

(Supplied: Paragraph numbers)

ORDER

S.K. PALO, J. :- Heard,

This revision under Section 397 read with Section 401 has been preferred challenging the order dated 13.08.2015 passed by 9th A.S.J. Jabalpur in Criminal Revision No. 60/2014, whereby the revision filed by the respondent was allowed and order of the J.M.F.C. Jabalpur dated 30.11.2013 was set aside and Criminal Case No. 8415/2010 was restored to its original number.

2. Filtering the unnecessary details the facts requisite for disposal of this petition are that the petitioners father purchased land with house vide registered sale deed dated 16.07.1940. The house was numbered 1493/1 and renumbered from time to time by the Municipal Corporation and presently numbered 3155.

3. After the death of his father, the petitioner No.1 became the owner of the property and is residing there. Respondent/non-applicant No.1 created hindrance in the petitioners peaceful possession over the said property. Therefore, civil litigation started which are pending before various Courts. Respondent No.1 lodged a report before Police Station Garha for offence under Section 294, 506 & 323/34 of I.P.C. This Criminal Case No. 8415/ 2010 was pending before J.M.F.C. Jabalpur. In the "National Lok Adalat" dated 30.11.2013, the same was withdrawn by the State Government under Section 321 of Code of Criminal Procedure. Therefore, the same was dismissed as withdrawn by the prosecution in public interest. This withdrawal of the case was challenged by respondent No.1 before the learned 9th A.S.J. Jabalpur as Criminal Revision No. 60/2014 in which the learned A.S.J. held that the order dated 30.11.2013 passed by J.M.F.C. Jabalpur is not an award passed by the Lok Adalat and in this circumstances, the legality of the said order can be challenged in revision.

4. It is further held that the withdrawal of the prosecution was not for valid reason. Therefore, the order dated 30.11.2013 was set aside and restored the Criminal Case No. 8415/2010 to decide in it's original number. C.J.M. Jabalpur was directed to proceed in the matter or to refer it to any appropriate Court.

5. The petitioners challenged the said order of the revisional Court and

requested for restoring the order of J.M.F.C. on several ground :-

6. It is stated that as per the Legal Services Authorities Act, 1987, the case was disposed of, therefore, the order is not revisable nor appealable.

7. Learned counsel for the respondent No.1 submits that the criminal case pending before the J.M.F.C. was neither compromised nor settled between the parties, therefore, the matter was not a settlement or award as per the ambit of Legal Session (sic:Services) Authorities Act, 1987.

8. Application under Section 321 of Cr. P.C. had no consent of the complainant. Therefore, order dated 30.11.2013 passed by the J.M.F.C. Jabalpur was not good in the eyes of law. The learned revisional Court has passed order dated 13.08.2015 which is well merited and does not warrant any interference.

9. Heard the rival contentions and perused the record.

10. Vide order dated 30.11.2013 in the National Lok Adalat, the Criminal Case No. 8415/2010 for offence under Sections 294, 323 and 506 (ii) of I.P.C. have been withdrawn by the prosecution which was allowed under Section 321 of the Cr. P.C. The accused/petitioners were acquitted for the said offences.

11. Aggrieved by this the respondent No.1 challenged the same before the revisional Court and the revisional Court after elaborate order has restored the criminal case to decide original number stating that it is not a "compromise" nor "award".

12. The matter which can be taken by the Lok Adalat for disposal are enumerated in Section 20 of the Legal Services Authority (sic:Authorities) Act, 1986 (sic:1987) which reads as under :-

> *"20 Cognizance of cases by Lok Adalats-* (1) Where in any case referred to in clause (i) of sub-section (5) of section 19.
>
> (1)(a) the parties thereof agree; or
>
> (b) one of the parties thereof makes an application to the Court, for referring the case to the Lok Adalat for settlement and if such Court is prima facie satisfied that there are chances of such settlement or

(ii) the Court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat.

the Court shall refer the case to the Lok Adalat;

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such Court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the authority or committee organising the Lok Adalat under sub-seciton (sic:section) (1) of Section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (i) of sub-section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for detemination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the Court, from which the reference has been received under sub-Section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground

that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advise the parties to seek remedy in a Court.

(7) Where the record of the case is returned under sub-section (5) to the Court, such Court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1)."

13. Hon'ble the Apex Court in the case of *State of Punjab Vs. Ganpat Raj*, 2007 (1) M.P. Weekly Note, 113 has opined that :-

" The specific language used in sub-section (3) of section 20 makes it clear that the Lok Adalat can dispose of a matter by way of a compromise or settlement between the parties. Two crucial terms in sub-sections (3) and (5) of section 20 are "compromise and "settlement." The former expression means settlement of difference, by mutual concessions. It is an agreement reached by adjustment of conflicting or opposing claims by reciprocal modification of demands. As per Terms de la ley, "compromise is a mutual promise to two or more parties that are at controversy." As per Bouvier it is" an agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon." The word "compromise" implies some element of accommodation on each side. It is not apt to describe total surrender. (see NFU Development Trust Ltd. Re [(1973) 1 All ER 135 = (1972) 1 WLR 1548 (Ch D)]). A compromise is always bilateral and means mutual adjustment. "Settlement" is termination of lagal proceedings by mutual consent. The case at hand did not involve compromise or settlement and could not have been disposed of by the Lok Adalat. If no compromise or settlement is or could be arrived at, no order can be passed by the Lok Adalat. Therefore, the disposal of Civil Writ Petition No. 943 of 2000 filed by the respondent is clearly impermissible."

14. Challenged was made before the learned Revisional Court is that the Lok Adalat had no jurisdiction to pass such an order. Powers under Section

321 of Cr. P.C. cannot be exercised in Lok Adalat.

15. In the case of *State of Punjab & Another Vs. Jalour Singh & Others,* (2008) 2 SCC 660, the Full Bench of the Hon'ble Apex Court has held that :-

> "Where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any Court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. In such a situation, the High Court ought to hear and dispose of the appeals on merits."

16. The learned counsel for the petitioners pressing his arguments submitted that no revision lie against the order of Lok Adalat relying upon the case of *P.T. Thomas Vs. Thomas Job,* (2005) 6 SCC 478 in which the Hon'ble Supreme Court has held that when the decree on compromise is based by the Lok Adalat it will have the same binding effect and be conclusive. It is final and permanent and equivalent a decree executable and is an end to the litigation among the parties.

17. The words used "decree on compromise" is very important. In the present case, the order dated 30.11.2013 cannot be deemed to be a decree on compromise order according to the Section 320 of Cr. P.C.

18. Counsel for the petitioners also stressed that the function of the Court in withdrawing the criminal case under Section 321 Cr. P.C. cannot be challenged, therefore, the same cannot be assailed before the revisional Court. He placed reliance on *State of Bihar Vs Ramnaresh Pandey,* AIR 1957 SC 389.

19. The withdrawal of prosecution can be allowed only in regular Court in exercise of powers under Section 321 Cr. P.C. and after examining the merits of the case, in the interest of justice. Without adverting to the merits of the application under Section 321 Cr. P.C. suffice, it to say that adjudication by the Court in exercise of its power under section 321 of Cr. P.C. could only be examined by a regular Court. The same cannot be exercised by a Lok Adalat as has been earlier stated in the case of *State of Punjab Vs. Ganpat Raj* (Supra).

20. The inevitable result in the present revision is therefore, order of the learned J.M.F.C. has rightly been set aside by the order of learned A.S.J. in Criminal Revision No. 60/2014, as the powers of disposal of cases by Lok Adalat relates to only "settlement" between the parties by 'compromise' and no case can be disposed of without 'compromise' or 'settlement' between the parties.

21. The revision, therefore, sans merit and dismissed.

Revision dismissed.

I.L.R. [2017] M.P., 959
CRIMINAL REVISION

Before Mr. Justice S.K. Gangele & Mr. Justice Subodh Abhyankar
Cr.R. No. 1640/2015 (Jabalpur) decided on 24 November, 2016

K.L. SAHU ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

(Alongwith Cr.R. No. 1642/2015, Cr.R. No. 1644/2015 & Cr.R. No. 1647/2015)

***Prevention of Corruption Act (49 of 1988), Section 3 & 4* – Jurisdiction of Special Court to frame the charges against the persons other than public servants for offences falling under IPC or any other law for the time being in force when it had discharged the other co-accused persons who were the public servants – Held – No charge of any conspiracy was framed against any of the non-public servants coupled with any of the sections of the Prevention of Corruption Act – It is also not a case where the public servant had died after framing of charges against all accused persons whereas public servants have been**

discharged – Wrong interpretation of the ratio laid down in the case of Jitendra Kumar Singh and failure in analysing the import of Prevention of Corruption Act itself – Impugned orders were quashed – Special Court is directed to remit the charge sheet to Chief Judicial Magistrate to proceed in accordance with law. (Paras 20, 21, 22 & 23)

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 3 व 4 – भा.दं.सं. अथवा वर्तमान समय प्रभावी किसी अन्य विधि के अंतर्गत आने वाले अपराधों के लिए लोक सेवकों के अतिरिक्त व्यक्तियों के विरूद्ध आरोप विरचित करने की विशेष न्यायालय की अधिकारिता जबकि उसने अन्य सह अभियुक्तों को आरोपमुक्त किया था जो कि लोक सेवक थे – अभिनिर्धारित – किसी गैर–लोक सेवक के विरूद्ध, कोई षड्यंत्र का आरोप भ्रष्टाचार निवारण अधिनियम की किसी धारा के साथ विरचित नहीं किया गया था – यह ऐसा प्रकरण भी नहीं जहां सभी अभियुक्तगण के विरूद्ध आरोप विरचित किये जाने के पश्चात् लोक सेवक की मृत्यु हुई थी जबकि लोक सेवकों को आरोपमुक्त किया गया था – जितेन्द्र कुमार सिंह के प्रकरण में प्रतिपादित आधार का गलत निर्वचन एवं भ्रष्टाचार निवारण अधिनियम के प्रयोजन का विश्लेषण करने में विफलता – आक्षेपित आदेश अभिखंडित – विशेष न्यायालय को आरोपपत्र मुख्य न्यायिक दण्डाधिकारी को विधिनुसार कार्यवाही करने के लिए प्रतिप्रेषित करने का निदेश दिया गया।

Case referred:

(2014) 11 SCC 724.

A.P. Shroti, for the applicants.
Piyush Bhatnagar, for the intervener.
Vivek Lakhera, P.L. for the non-applicant/State.

ORDER

The Order of the Court was delivered by : **SUBODH ABHYANKAR, J. :-** This order would also govern the disposal of CR.R .No.1642/2015 (J.L. Sahu Vs. State of Madhya Pradesh), CR.R. No.1644/2015 (Manoj Kumar Sahu vs. State of Madhya Pradesh) and CR.R. No.1647/2015 (Smt Anuja Sahu vs. State of Madhya Pradesh) as common question of facts and law are involved in these criminal revisions.

2. The sole question of law before this Court is whether a Special court constituted under S.3 of the Prevention of Corruption Act, 1988 (hereinafter referred to **"P.C.Act"**) can try a case against the persons other than public servants for offences falling under Indian Penal Code or for that matter under

any other law for the time being in force, when it has already discharged the public servants from the offences alleged to have been committed under the P.C. Act and the IPC.

3. For the sake of convenience the facts relating to Criminal Revision No.1640 of 2015 are taken into consideration in order to decide the common issues in all these matters.

4. All these criminal revisions have been filed by the persons, who are accused in Special Case No.7/2011 wherein the charge sheet has been filed by the Economic Offences Bureau, Bhopal. These cases are pending before the Special Judge, Prevention of Corruption Act, Bhopal (M.P.) who, vide impugned order Annexure P/14 dated 16.01.2014 has held that the charges are liable to be framed and vide order Annexure P/9 dated 4.7.2015 has held that the Special Court has the jurisdiction to try the case.

5. To understand the controversy, the brief facts of the case, shorn of the unnecessary details are that a charge sheet was filed against the petitioners of these criminal revisions who are non-public servants as also against the other accused persons including the public servants on the ground that on the basis of a complaint wherein it was alleged that petitioner K.L.Sahu, Secretary of the Awas Rahat Grih Nirman Sahakari Samiti Maryadit committed fraud with the members of the society and in the garb of the society, allotted plots contrary to the byelaws and in the process, accepted money by conspiring with other accused persons including public servants.

6. The Charge sheet was filed agaisnt (sic:against): (1) K.L. Sahu S/o Late Mannilal Sahu (2) J.K. Sahu S/o K.L. Sahu (3) O.P. Rai S/o Late Radheshyam (4) Dr. L.P. Bajpayee S/o Gangacharan Bajpayee (5) A.R. Hasan S/o S.A. Hussain (6) Manoj Kumar S/o K.L. Sahu (7) Dinesh Kumar Jain (8) B.P. Verma S/o B.R. Verma (9) Smt Anuja Sahu W/o Shri Sharad Sahu (10) Pradeep Kumar Gupta S/o Shivmurti Gupta (11) D.N. Shrivastava S/o Late R.S.Shrivastava (12) Yajyoj Kumar @ Yaggoj Kumar @ Y.K.Sahu S/o K.L. Sahu (13) R.B. Shrivastava (14) S.K. Shukla, (15) Smt. Sushila Sahariya (16) Dr.S.K.Saxena. Out of these 16 accused persons, only **accused No.13 - R.B. Shrivastava, Auditor, Co-operative Department and accused No.14 - S.K. Shukla, Senior Inspector, Co-operative Department are the public servants.**

7. Initially, vide order datd 29.08.2013 charges were framed against all

of the aforesaid accused persons under Sections 120-B, 406, 420, 467, 468, 471 of IPC and Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. Against the aforesaid order of framing of charges dated 29.8.2013, a Criminal Revision No.2171/2013 was preferred by K.L. Sahu, which was disposed of by this Court vide order dated 12.11.2013 whereby the order of framing of charge was set aside and the Trial Court was directed to pass appropriate orders on framing of charges. Similarly, the other accused Y.K. Sahu also preferred Criminal Revision No.2321/2013. The aforesaid revision was also allowed and the order of framing of charge was set aside vide order dated 03.12.2013 and the Special Court was directed to consider afresh the question of framing of charge and frame specific charge against each accused persons. The aforesaid order dated 03.12.2013 is filed along with this revision as Annexure P/11.

8. After the matter was remanded back to the Special Court, the Special Court, after hearing all the accused persons, on 16.1.2014 passed as many as three orders in respect of framing of charges. The first order is filed as **Annexure P/13** wherein it is mentioned that accused K.L.Sahu, J.K.Sahu, Anuja Sahu and Manoj Sahu are liable to be charged as decided by a **separate order** under Sections including 418, 420, 409 and 120-B of IPC whereas other accused persons viz. O.P. Rai, Dr. L.P. Bajpayee, A.R. Hasan, Dinesh Kumar Jain, B.P. Verma, Pradeep Kumar Gupta, D.N. Shrivastava, Yajyoj Kumar Sahu, R.B. Shrivastava, S.K. Shukla, Smt. Sushila Sahariya and Dr.S.K.Saxena have been altogether discharged under Sections 120-B, 406, 409, 420, 467, 468, 471 of IPC and Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. In the same order sheet, the prosecution is also directed to submit a trial program and summon the witnesses accordingly for recording of their evidence for the prosecution. The **separate order** mentioned in Annexure-P/13 is filed as **Annexure P/14**, which was also passed on 16.01.2014 and after hearing each of the accused persons and by specifically dealing with the individual case, the learned Special Judge held that prima facie case is made out against the petitioners for framing the charges under **Section 418, 420, 409 and 120-B of IPC** whereas other accused persons, including public servants as stated above were altogether discharged. On 16.01.2014 vide Anneure P/15 the charges were also framed against the accused persons under the provisions of IPC simpliciter as aforesaid.

9. Being aggrieved of the order framing of charges, the petitioner—K.L.

Sahu preferred Criminal Revision No.243/2014, which was allowed by this Court vide its order dated 25.9.2014 wherein it was held that since the petitioner has raised the issue of jurisdiction for the first time before this Court, hence it would be appropriate if the matter is remanded back with a liberty to the petitioner to raise the issue of jurisdiction first before the concerned Special Judge.

10. In pursuance of the order passed by this Court, the Special Judge of the Trial Court has passed the impugned order Annexure-P/19 on 04.07.2015 whereby the learned Special Judge, relying upon the decision rendered by the Hon'ble Supreme Court in the case of *New Delhi vs. Jitender Kumar Singh* [reported in (2014)11 SCC 724] has held that since the charges were already framed against the petitioners/non-public servants before the public servants could be discharged, hence the Special court has the jurisdiction to try the case. This order Annexure P/9 dated **04.07.2015** is also under challenge before this Court.

11. The petitioners have come before this court against the aforesaid orders viz. order dated 16.01.2014 viz. Annexure-P/13, Annexure-P/14 (whereby reasoning has been assigned to frame charges) and Annexure-P/15 (order framing charges) as also the order Annexure-P/19 dated 04.07.2015, confirming the aforesaid order Annexure-P/14 dated 16.01.2014. The challenge is primarily on two grounds, viz., firstly, that the learned Judge of the Special Court has erred in framing charges against the petitioner in as much as the said court had no jurisdiction to frame the charges against the petitioner- non-public servants on account of the fact that on the same day i.e. on 16.01.2014 itself the learned Judge of the special court had discharged the other co-accused persons including **accused No.13 - R.B. Shrivastava, Auditor** and **accused No.14 - S.K. Shukla, Senior Inspector** who were the public servants from the offences punishable inter alia under ss.13(1)(d) r/w.13(2)of the P.C. Act. Thus, according to the learned counsel for the petitioner after discharging the other accused persons who were also the public servants from the offences under the P.C. Act, the learned Judge had no jurisdiction to frame charges and to try the petitioners for offences punishable under the Indian Penal Code simpliciter. The second ground of challenge is that even on merits no case for framing of charges under the provisions of IPC can be said to be made out against the petitioners.

12. On the other hand the learned counsel for the Lokayoukt and the

learned counsel for the objector have submitted that the impugned orders are just and proper and need no interference. It is their contention that before passing of the impugned order Annexure-P/15, the learned Judge had not discharged the other co-accused public servants and it is only after the charges were framed against the petitioners, that the other accused persons, including the public servants were discharged, hence the court had the jurisdiction to frame charges against the petitioners.

13. Heard the learned counsel for the parties and perused the record.

14. Before we proceed to deal with the legal aspect of the matter it would be germane to reproduce the relevant paragraphs of the impugned order dated 16.01.2014 to demonstrate the manner in which it was passed by the learned Special Judge as it has a bearing on the subject matter at hand.

15. In respect of the petitioner K.L.Sahu, J.K.Sahu, Anuja Kumari Sahu and Manoj Sahu the learned Judge held as under in sequence of the following paras:-

<u>अभियुक्त के. एल .साहु –</u>

"22. इस न्यायालय के अभिमत में अभियुक्त के.एल.साहु के विरुद्ध धारा 418, 420 एवं 409 एवं धारा 120–ख भा.द.सं. के अधीन दण्डनीय अपराध प्रथमदृष्टया गठित होता है *अतः उक्त अपराध के संबंध में आरोप पत्र विरचित किया गया। अभियुक्त को आरोप पढकर सुनाया गया। अभियुक्त ने आरोपित अपराध अस्वीकार किया और विचारण किये जाने का दावा किया। अभियुक्त का अभिवाक लेखबद्ध किया गया।* "

<u>अभियुक्त जे.के.साहु–</u>

"23. अभियुक्त जे.के.साहु के विरूद्ध आवास गृह निर्माण सहकारी समिति के तत्कालीन अध्यक्ष की हैसियत से समिति के सचिव के.एल.साहु के साथ मिलकर भूखण्डों के अनियमित आबंटन एवं पट्टा विलेख निष्पादन कर अवैध लाभ अर्जित करने संबंधी आपराधिक षडयंत्र किये जाने का अभियोजन है। **जे. के. साहु के विरूद्ध इस न्यायालय के अभिमत में धारा 418 सहपठित धारा 120–ख, धारा 420 सहपठित धारा 120–ख एवं धारा 409 भा. द.सं. एवं धारा 409 सहपठित धारा 120–ख भा.द.सं. के अधीन दण्डनीय अपराध प्रथमदृष्टया गठित होता है। अतः उक्त अपराध के संबंध में आरोप पत्र विरचित किया गया। अभियुक्त जे.के. साहू को आरोप पढकर सुनाया गया। अभियुक्त ने आरोपित अपराध अस्वीकार किया और विचारण किये जाने का दावा किया। अभियुक्त का**

अभिवाक लेखबद्ध किया गया।"

अभियुक्त अनुजा कुमारी साहु एवं मनोज साहु–

"24. इन अभियुक्तों का प्रकरण एक समान है अतः इन पर एक साथ विचार किया जा रहा है। मुख्य आरोपी के.एल साहु तत्कालीन सचिव एवं जे. के. साहु तत्कालीन अध्यक्ष पर यह अभियोजन है कि उनके द्वारा परिजनों को लाभ पहुंचाने के लिये सदस्यों की वरिष्ठता सूची में परिवर्तन किया गया। परिजनों को स्वीकृत अभिन्यास से अधिक क्षेत्रफल का भूखण्ड आबंटित कर पट्टा विलेख निष्पादित किया गया। अभियुक्त मनोज कुमार साहु, अनुजा साहु के विरूद्ध यह अभियोजन किये गये हैं कि उन्होंने समिति के संचालक होते हुए अवैध लाभ अर्जित करने हेतु मुख्य आरोपी के.एल. साहु को सचिव नियुक्त किया था और उक्त पद का दुरुपयोग कर समिति के भूखण्डों के अवैध आबंटन द्वारा लाभ अर्जित करने हेतु आपराधिक षडयंत्र किया। अभिलेख पर उपलब्ध सामग्री से इन दोनों अभियुक्तों के पक्ष में स्वीकृत अभिन्यास से अधिक क्षेत्रफल के भूखण्ड आबंटित कर अवैध लाभ अर्जित कराया जाना प्रथम दृष्टया प्रगट होता है। इस न्यायालय के अभिमत में अभिलेख पर उपलब्ध सामग्री से अभियुक्त मनोज कुमार साहु, डा. अनुजा साहु के विरूद्ध धारा 418 सहपठित धारा 120–ख, धारा 420 सहपठित धारा 120–ख एवं धारा 409 सहपठित धारा 120–ख के अधीन दण्डनीय अपराध प्रथमदृष्टया गठित होते हैं। अतः उक्त अपराध के संबंध में आरोप पत्र विरचित किया गया। अभियुक्तों को आरोप पढकर सुनाया गया। अभियुक्तों ने आरोपित अपराध अस्वीकार किया और विचारण किये जाने का दावा किया। अभियुक्तों का अभिवाक लेखबद्ध किया गया।"

In the same order, in subsequent para 31, accused S.K.Shukla, the public servant was discharged in the following manner:-

अभियुक्त एस.के. शुक्ला –

"31. विवेचना के आधार पर अभियुक्त एस.के. शुक्ला को धारा –406, 409, 467, 468, 471 सहपठित धारा 120 (ख) भा0दं0सं0 तथा धारा–13 (1) (डी) सहपठित 13 (2) भ्रष्टाचार निवारण अधिनियम एवं धारा– 120 (ख) भा0दं0सं0 के अधीन दंडनीय अपराध के आरोप से उन्मोचित कर स्वतंत्र किया जाता है। उक्त अभियुक्त की उपस्थिति संबंधी प्रतिभूति एवं बंधपत्र भारमुक्त एवं निरस्त किए जाते हैं।"

In para 35, accused Sushila Sahariya, Dr.S.K.Saxena, Dinesh Kumar Jain

and S.R.Hasan were discharged in the following manner:-

अभियुक्त सुशीला सहारिया, डा0 एस0के0 सक्सेना, दिनेश कुमार जैन एवं एस0आर0 हसन –

"35. समिति के प्रस्ताव का पूर्वोक्त उल्लेख स्वयंमेव यह स्पष्ट कर देता है कि तत्कालीन संचालक मंडल द्वारा अभियुक्त के0एल0 साहू को संस्था का अवैतनिक सचिव नियुक्त करते हुए उन्हें अध्यक्ष और प्रबंध कार्यकारिणी के निर्देशों में बैंक से आहरण एवं जमा संबंधी कार्य के लिए अधिकृत किया गया था। अभियुक्त के0एल0 साहू का आवास राहत गृह निर्माण सहकारी समिति के भूखंडों के अनियमित आवंटन द्वारा अवैध लाभ अर्जित किया जाना, इस प्रकरण का आधारभूत अभियोजन है। वर्ष 1988 की प्रबंध कार्यकारिणी समिति द्वारा अभियुक्त के0एल0 साहू को भूखंड आवंटन के संबंध में अधिकृत किए जाने का कोई उल्लेख बैठक की कार्यवाही में नहीं है। वस्तुतः आवास राहत गृह निर्माण सहकारी समिति को वर्ष 2003 में प्रथमतः म0प्र0 शासन राजस्व विभाग के पत्र दिनांक 04.03.2003 द्वारा स्थाई पट्टे पर भूमि का आवंटन प्राप्त हुआ था, जिसका सदस्यों को उपपट्टे पर अतंरण वर्ष 2007 में प्रारंभ हुआ। स्पष्टतः वर्ष 1988 में वह भूमि ही अस्तित्व में नहीं थी, जिसके अनियमित आवंटन द्वारा अवैध लाभ अर्जित करने संबंधी अभियुक्त के0एल0साहू के विरुद्ध अभियोजन संस्थित किया गया। अभिलेख पर ऐसा कोई प्रमाण नहीं है, जिससे प्रथम दृष्ट्या यह दर्शित होता हो कि वर्ष 1988 की प्रबंध कार्यकारिणी समिति द्वारा अभियुक्त के0एल0 साहू को बैंक में जमा और आहरण के लिए अधिकृत करने पर अभियुक्त के0एल0 साहू द्वारा समिति की बैंक में जमा राशियों के संबंध में आपराधिक न्यास भंग अथवा कपटपूर्ण कूटकरण किया गया है अंकेक्षण में इस आशय की कोई अंकेक्षण रिपोर्ट, लेखा अथवा अन्य प्रलेखीय प्रमाण एकत्रित नहीं किये गये। मात्र दूरस्थ कोई संभावना या विवेचक की परिकल्पना के आधार पर, वर्ष 1988 में अभियुक्त के0एल0 साहू को अवैतनिक सचिव के पद पर नियुक्त किए जाने और बैंक की कार्यवाहियों के लिए अधिकृत किए जाने मात्र से अभियुक्त सुशील सहारिया, डा0 एस0के0 सक्सेना, दिनेश कुमार जैन एवं एस0आर0 हसन के विरूद्ध ऐसी कोई उपधारणा नहीं की जा सकती कि उनके द्वारा 15 वर्ष के बाद वर्ष 2003 में आवंटित होने वाली संभावित भूमि के आवंटन में अनियमितता एवं अवैध लाभ अर्जित करने को सुकर बनाने की दृष्टि से अभियुक्त के0एल0साहू के साथ आपराधिक षडयंत्र किया गया था और उसी आपराधिक षडयंत्र के तहत के0एल0साहू को अवैतनिक सचिव नियुक्त किया गया था। फलतः उक्त अभियुक्तों के विरूद्ध अभियोजन प्रलेखों को यथावत स्वीकार कर लिए जाने की दशा में भी अभियुक्त सुशीला सहारिया, डा0 एस0के0 सक्सेना, दिनेश कुमार जैन एवं एस0आर0 हसन के विरूद्ध अन्य अभियुक्त के0एल0 साहू के साथ मिलकर आपराधिक न्यास भंग, कपट अथवा

आपराधिक अवचार का षडयंत्र किए जाने संबंधी अपराध प्रथम दृष्ट्या गठित नहीं होते। *तद्नुसार अभियुक्त सुशीला सहारिया, डा0 एस0के0 सक्सेना, दिनेश कुमार जैन एवं एस0आर0 हसन को धारा–406, 409, 467, 468, 471 सहपठित धारा 120 (ख) मा0दं0सं0 तथा धारा–13 (1) (डी) सहपठित 13 (2) भ्रष्टाचार निवारण अधिनियम एवं धारा–120 (ख) मा0दं0सं0 के अधीन दंडनीय अपराध के आरोप से उन्मोचित कर स्वतंत्र किया जाता है। उक्त अभियुक्तों की उपस्थिति संबंधी प्रतिभूति एवं बंधपत्र भारमुक्त एवं निरस्त किए जाते हैं।"*

In para 46, accused L.P.Bajpai, B.P.Verma, Padeep Gupta, O.P.Rai and D.N.Shrivastava were discharged in the following manner:-

<u>अभियुक्त एल.पी. बाजपेयी, बी.पी. वर्मा, प्रदीप गुप्ता, ओ. पी. राय एवं डी. एन. श्रीवास्तव –</u>

"46. ऐसी दशा में अभियुक्त एल.पी. बाजपेयी, बीपी. वर्मा एवं प्रदीप गुप्ता, ओ. पी. राय एवं डी. एन. श्रीवास्तव के विरूद्ध अन्य अभियुक्त के.एल. साहू के साथ मिलकर आपराधिक न्यास भंग एवं कपटपूर्ण अवैध लाभ अर्जित करने के आपराधिक षडयंत्र का प्रथम दृष्ट्या अपराध गठित नहीं होता है। *फलतः उक्त अभियुक्त एल.पी. बाजपेयी, बी.पी. वर्मा एवं प्रदीप गुप्ता को धारा–406, 409, 467, 468, 471 सहपठित धारा 120 (ख) मा0दं0सं0 तथा धारा–13 (1) (डी) सहपठित 13 (2) भ्रष्टाचार निवारण अधिनियम एवं सहपठित धारा–120 (ख) मा0दं0सं0 के अधीन दंडनीय अपराध के आरोप से उन्मोचित कर स्वतंत्र किया जाता है। उक्त अभियुक्तों की उपस्थिति संबंधी प्रतिभूति एवं बंधपत्र भारमुक्त एवं निरस्त किए जाते हैं।"*

In para 48, accused Y.K.Sahu @ Yajyoj Kumar Sahu was discharged in the following manner:-

<u>अभियुक्त वाय.के. साहू –</u>

"48. अभियोजन द्वारा प्रस्तुति प्रलखों में वर्ष 91–92 के अंकेक्षण अनुलग्न पी–36 में श्री वाय0कुमार क्लर्क को मासिक वेतन रूपये 400/– पर स्थाई कर्मचारी के रूप में नियुक्त किए जाने का उल्लेख है, परंतु अभिलेख पर इस संबंध में लेशमात्र प्रमाण नहीं है कि अंकेक्षण प्रतिवेदन में जिस वाय0कुमार क्लर्क का उल्लेख है, वही अभियुक्त यजयोज कुमार साहू है। इस संबंध में भी कोई प्रमाण उपलब्ध नहीं है कि यजयोज कुमार साहू को ही डमी कर्मचारी के रूप में उक्त रूपये–400/– मासिक वेतन का भुगतान किया जाता रहा

था। वस्तुतः उक्त भुगतान के संबंध में अभिलेख पर संस्था के रजिस्टर, रसीद अथवा लेखे प्रस्तुत नहीं हैं। इन परिस्थितियों में अभिलेख पर उपलब्ध सामग्री को यथावत स्वीकार कर लिया जावे तो भी यह तथ्य प्रमाणित नहीं होता कि अभियुक्त के0ए0साहू द्वारा उसके पुत्र यजयोज कुमार साहू को डमी कर्मचारी के रूप में समिति में नियुक्त कर रूपये–400/– प्रतिमाह का भुगतान कर अवैध लाभ अर्जित किया गया था। अभियुक्त यजयोज कुमार साहू के पक्ष में पात्रता के बिना अथवा वरिष्ठता से परे भूखण्ड के आवंटन के माध्यम से अवैध लाभ अर्जित करने संबंधी कोई अभियोजन नहीं है फलतः अभियुक्त यजयोज साहू के विरूद्ध अभियुक्त के.एल.साहू के साथ मिलकर अवैध लाभ अर्जित करने के उद्देश्य से आपराधिक न्यास भंग और कपट के आपराधिक षडयंत्र का अपराध प्रथम दृष्ट्या भी गठित नहीं होता। *विवेचना के आधार पर अभियुक्त यजयोज कुमार साहू को धारा–406, 409, 467, 468, 471 सहपठित धारा 120 (ख) भा0दं0सं0 तथा धारा–13 (1) (डी) सहपठित 13 (2) भ्रष्टाचार निवारण अधिनियम एवं सहपठित धारा– 120 (ख) भा0दं0सं0 के अधीन दंडनीय अपराध के आरोप से उन्मोचित कर स्वतंत्र किया जाता है। उक्त अभियुक्तों की उपस्थिति संबंधी प्रतिभूति एवं बंधपत्र भारमुक्त एवं निरस्त किए जाते हैं।"*

(emphasis supplied)

In para 50, accused R.B. Shrivastava, the public servant was discharged in the following manner:-

<u>अभियुक्त आर.बी. श्रीवास्तव :–</u>

"**50.** ..... अभियोजन द्वारा प्रस्तुत प्रलेखीय प्रमाणों को यथावत स्वीकार कर लेने की दशा में भी अभियुक्त आरबी. श्रीवास्तव के विरूद्ध अवैध लाभ अर्जित करने के उद्देश्य से अन्य अभियुक्त के.एल. साहू के साथ आपराधिक षडयंत्र किये जाने अथवा अंकेक्षक के रूप में पदीय कर्तव्य निर्वहन में अवैध लाभ अर्जित करने के उद्देश्य से उपेक्षा कर आपराधिक अवचार किया जाना प्रथम दृष्टया दर्शित नहीं होता है। फलतः *अभियुक्त आर.बी. श्रीवास्तव को धारा–406, 409, 467, 468, 471 सहपठित धारा 120 (ख) भा0दं0सं0 तथा धारा–13 (1) (डी) सहपठित 13 (2) भ्रष्टाचार निवारण अधिनियम एवं सहपठित धारा– 120 (ख) भा0दं0सं0 के अधीन दंडनीय अपराध के आरोप से उन्मोचित कर स्वतंत्र किया जाता है। उक्त अभियुक्त की उपस्थिति संबंधी प्रतिभूति एवं बंधपत्र भारमुक्त एवं निरस्त किए जाते हैं। अवशेष कार्यवाही मूल आदेश पत्रिका में की गई।"*

It appears from the above that the learned Judge has passed the aforesaid

order in such a manner as if after holding that the charge is liable to be framed against the accused persons, he stopped in the middle of the order, framed the charges against them in a separate order-sheet, recorded their plea and then proceeded further to pass the order of discharge in respect of the other accused persons.

16. In the light of the aforesaid order dated 16.01.2014, the learned special judge has passed the impugned order Annexure P/19 dated 04.07.2015 in the following terms:-

> "पूर्वोक्त परिस्थिति को देखते से यह सुव्यक्त है कि हस्तगत मामले में <u>इस न्यायालय ने भ्रष्टाचार निवारण अधिनियम की धारा 4 (3) के तहत प्रदत्त शक्तियों का प्रयोग करते हुए अभियुक्तगण के विरूद्ध भा.द. सं. के अपराध का आरोप विरचितकर प्रकरण अभियोजन साक्ष्य हेतु नियत कर दिया। इसके पश्चात लोक सेवक, जिनके विरूद्ध भ्रष्टाचार निवारण अधिनियम के अपराध का आरोप था, उसमे उन्मोचित किया गया तब न्यायालय इससे पीछे अब नहीं जा सकती है।</u> माननीय सर्वोच्च न्यायालय के (राज्य सीबीआई) द्वारा उक्त मामले में कीमिनल अपील नं. 943/08 में जो विधि सिद्धांत सुस्थापित किया है वही सिद्धांत हस्तगत मामले में प्रयोज्य होता है इस कारण हस्तगत मामले का विचारण इस न्यायालय द्वारा अग्रसर जारी रहेगा।
>
> हस्तगत मामले में आरोप विरचित करने से पूर्व लोकसेवक की मृत्यु अर्थात लोकसेवक को अभिकथित अपराध से उन्मोचित नहीं किया गया है ऐसी स्थिति में अभियुक्तगत के विद्वान अभिभाषक का यह तर्क कि अभियुक्तगत को अभिकथित अपराध से उन्मोचित किया जाये, मान्य किये जाने योग्य नहीं है। वैसे भी हस्तगत मामले में इस न्यायालय द्वारा यदि आरोप विरचित नहीं किया जाता और लोकसेवक की मृत्यु हो जाती और केवल प्रायवेट व्यक्ति जीवित रहता जिसके विरूद्ध केवल भा.द.सं. के अपराध का आरोप रहता तब अभियुक्तगण जोकि अधिनियम के अपराध का आरोप नहीं है उनको आरोप से उन्मोचित नहीं किया जाता बल्कि उस मामले को सक्षम न्यायालय में विचारण हेतु अभियोग पत्र को वापिस किया जाता। उस दशा में कीमिनल अपील नं. 161/11 में माननीय सर्वोच्च न्यायालय द्वारा सुस्थापित विधि सिद्धांत हस्तगत मामले के तथ्य एवं परिस्थितियों में प्रयोज्य नहीं हैं। ऐसी स्थिति में अभियुक्तगण के विद्वान अभिभाषक का तर्क मान्य किये जाने योग्य नहीं है तदनुसार उसे अमान्य किया जाता है।"
>
> (emphasis supplied)

17. In order to appreciate the rival contentions of the parties, it would be germane to reproduce Sections 3 and 4 of the PC Act which read as under:-

"3. Power to appoint special Judges. — (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification **to try the following offences,** namely:—

(a) **any offence punishable under this Act;** and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974).

4. **Cases triable by special Judges.—**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.

(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) **When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.**

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis."

(emphasis supplied)

18. In the impugned order dated 04.07.2015, the learned judge has considered the jurisdictional aspects of the aforesaid order dated 16.01.2014 passed by his predecessor and after testing it on the anvil of the order passed by the Hon'ble Apex court in the case of *Sate (sic:State) through Central Bureau of Investigation, New Delhi vs. Jitender Kumar Singh* [reported in (2014)11 SCC 724] held that the present case falls under the category of Cr.A.No.943 of 2008 as observed by the Hon'ble Supreme Court in the aforesaid case. The Hon'ble Apex court has dealt with the Cr.A.No.943 of 2008 and Cr.A. No.161 of 2011 from para 37 to 46 in the following manner:

> "37. Exclusion of the jurisdiction of ordinary Criminal Court, so far as offences under the PC Act are concerned, has been explicitly expressed under Section 4(1) of the PC Act, which does not find a place in respect of non-PC offences in sub-section (3) of Section 4 of the PC Act. Further, it is not obligatory on the part of a Special Judge to try non-PC offences. The expression "may also try" gives an element of discretion on the part of the Special Judge which will depend upon the facts of each case and the inter-relation between PC offences and non-PC offences.
>
> 38. **A Special Judge exercising powers under the PC Act is not expected to try non-PC offences totally unconnected with any PC offences under Section 3(1) of the PC Act and in the event of a Special Judge not trying any offence under Section 3(1) of the PC Act, the question of the Special Judge trying non-PC offences does not arise.** As already indicated, trying of a PC offence is a jurisdictional fact to exercise the powers under Sub-section (3) of Section 4. The jurisdiction of the Special Judge, as such, has not been divested, but the exercise of jurisdiction, depends upon the jurisdictional fact of trying a PC offence. We are, therefore, concerned with the exercise of jurisdiction and not the existence of jurisdiction of the Special Judge.
>
> 39. The meaning and content of the expression "jurisdictional fact" has been considered by this Court in *Carona Ltd. v. Parvathy Swaminathan & Sons*, and noticed that where the jurisdiction of a Court or a Tribunal is dependent

on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court. In *Ramesh Chandra Sankla v. Vikram Cement,* this Court held that by erroneously assuming existence of the jurisdictional fact, a Court cannot confer upon itself jurisdiction which otherwise it does not possess.

40. We have already indicated that the jurisdictional fact so as to try non-PC offences is "trying any case" under the PC Act. As noticed by this Court in *Ratilal Bhanji Mithani v. State of Maharashtra*, the trial of a warrant case starts with the framing of charge. Prior to that the proceedings are only an inquiry. The Court held as follows:-

> "28. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Sections 349 and 562 of the Code of 1898 (which correspond to Sections 325 and 360 of the Code of 1973)."

41. We may now examine whether, in both these appeals, the above test has been satisfied.

42. First, we may deal with Criminal Appeal No. 943 of 2008. CBI, in this appeal, as already indicated, submitted the charge-sheet on 1.11.2001 for the offences against A-1, who was a public servant, as well as against non-public servants. Learned Special Judge had, on 25.3.2003, framed the charges against the accused persons under Section 120-B read with Sections 467, 471 and 420 IPC and also under Sections 13(1)(d) and13(2) of the PC Act and substantive offences under Sections 420, 467 and 471 IPC and also substantive offences under Sections 13(1)(d) and 13(2) of the PC Act against the public servants. Therefore, charges have been framed against the public servants as well as non-public servants after hearing the prosecution and defence counsel, by the special Judge on 25.3.2003 in respect of PC offences as well as non- PC offences. As already indicated, under sub-section (3) of Section 4, when trying any case, a Special Judge may also try any offence other than the offence specified in Section 3 and be charged in the same trial. The Special Judge, in the instant case, has framed charges against the public servant as well as against the non-public servant for offences punishable under Section 3(1) of PC Act as well as for the offences punishable under Section 120B read with Sections 467, 471 and 420 and, therefore, the existence of jurisdictional fact, that is "trying a case" under the PC Act has been satisfied.

43. The Special Judge after framing the charge for PC and non-PC offences posted the case for examination of prosecution witnesses, thereafter the sole public servant died on 2.6.2003. Before that, the Special Judge, in the instant case, has also exercised his powers under sub-section (3) of Section 4 of the PC Act and hence cannot be divested of the jurisdiction to proceed against the non-public servant, even if the sole public servant dies after framing of the charges. On death, the charge against the public servant alone abates and since the special Judge has already exercised his jurisdiction under sub-section (3) of Section 4 of the PC Act, that jurisdiction cannot be divested due to the death of the sole public servant.

44. We can visualize a situation where a public servant dies at the fag end of the trial, by that time, several witnesses might have been examined and to hold that the entire trial would be vitiated due to death of a sole public servant would defeat the entire object and purpose of the PC Act, which is enacted for effective combating of corruption and to expedite cases related to corruption and bribery. The purpose of the PC Act is to make anti-corruption laws more effective in order to expedite the proceedings, provisions for day-to-day trial of cases, transparency with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been provided under the PC Act. Consequently, once the power has been exercised by the Special Judge under sub-section (3) of Section 4 of the PC Act to proceed against non-PC offences along with PC offences, the mere fact that the sole public servant dies after the exercise of powers under sub-section (3) of Section 4, will not divest the jurisdiction of the Special Judge or vitiate the proceedings pending before him.

45. We are, therefore, inclined to allow Criminal Appeal No. 943 of 2008 and set aside the order of the High Court and direct the Special Judge to complete the trial of the cases within a period of six months.

46. We may now examine Criminal Appeal No. 161 of 2011, where the FIR was registered on 2.7.1996 and the charge-sheet was filed before the Special Judge on 14.9.2001 for the offences under Sections 120B, 420, IPC read with Sections 13(2) and 13(1) of the PC Act. Accused 9 and 10 died even before the charge-sheet was sent to the Special Judge. The charge against the sole public servant under the PC Act could also not be framed since he died on 18.2.2005. The Special Judge also could not frame any charge against non-public servants. As already indicated, under sub-section (3) of Section 4, the special Judge could try non-PC offences only when "trying any case" relating to PC offences. In the instant case, no PC offence has been committed by any of the non-public

servants so as to fall under Section 3(1) of the PC Act. Consequently, there was no occasion for the special Judge to try any case relating to offences under the PC Act against the Appellant. The trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine qua non for exercising powers under sub-section (3) of Section 4 of PC Act. In the instant case, since no PC offence has been committed by any of the non-public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant. The jurisdictional fact, as already discussed above, does not exist so far as this appeal is concerned, so as to exercise jurisdiction by the Special Judge to deal with non-PC offence."

(emphasis supplied)

19. The learned Special Judge has relied upon the ratio of the aforesaid judgment of the Hon'ble Apex court passed in Cr.A. No.943 of 2008 wherein the accused-public servant had died after framing of the charges but before evidence could be led. Thus, by drawing analogy from Cr.A. No.943 of 2008 the learned Special Judge has held that since the charges were already framed by his predecessor on 16.01.2014 (Annexure-P/15) hence there is no gainsaying that the Special Court had no jurisdiction. The learned Judge also observed that a detailed order (Annexure-P/14) has been passed by his predecessor in respect of the framing of charges, and in that common order which is reproduced above, he first held that charges under IPC are liable to be framed against the non-public servants and then in subsequent paras of the same order discharged the public servants from all the charges. Thus, according to the learned Special Judge, when the charges were being framed against the petitioners/non-public servants, the Special Court had the jurisdiction to try the case because by that time the public servants were not discharged. In our considered opinion, the learned Judge has not only wrongly interpreted the ratio laid down in the case of *Jitendra Kumar Singh* (supra) but has miserably failed to analyze the import of PC Act itself.

20. Admittedly, no charge of any conspiracy was framed against any of the non-public servant accused coupled with any of the sections of the P.C. Act. It is also not a case where the public servant had died after framing of charges against all accused persons, in fact in the present case the public servants were found to have not committed any offence at all including any offence under the P.C. Act. The learned Judge has erred in not considering the fact that the observations made in para 46 of the *Jitendra Kumar's* case (supra) are applicable in the present case as well.

21. It is beyond our faculties as to how the learned judge of the Special Court has decided the fate of parties on the ground of having written one paragraph prior to another. Learned Special Judge erred in holding that the case is triable by Special Judge only on the ground of sequencing of the paragraphs in the order Annexure P/14 dated 16.01.2014. It is difficult to envisage a scenario where a party's rights can be decided on sequencing of the paragraphs and not by the material on record and its merit. To allow sequence of paragraphs in a judgment to dictate the jurisdiction of a court would be a travesty of legal system. A judgment has to be read as a whole and the sequence of its paragraphs is not at all relevant. A judgment/order which affects the rights of the contesting parties only because of the manner in which it is written would also defeat the very principle of equity and equality enshrined under Art. 14 of the Constitution of India hence the impugned orders are liable to be quashed.

22. In the considered opinion of this Court, the reasoning adopted by the learned Trial court was un-warranted, unjust and without application of mind. The learned Special Judge, while passing the impugned order lost sight of the purpose of the PC Act which, as described in para 44 of the *Jitendra Kumar Singh's* case (supra) is, ***" to make anti-corruption laws more effective in order to expedite the proceedings, provisions for day-to-day trial of cases, transparency with regard to grant of stay and exercise of powers of revision on interlocutory orders".*** Thus, once a person is tried by a Special Court under special Act, he is faced with stringent provisions of law and the remedies as are available to an offender under the common law are restricted hence, prosecution of a person by a Special Court cannot be said to be a mere formality or an inconsequential event as it causes substantial prejudice to his rights.

23. In the result, all the criminal revisions are **allowed** and the impugned orders dated **16.01.2014** (filed as Annexures-P/13, P/14 & P/15 in Criminal Revision

No.1640/2015; as Annxexures P/11, P/12 & P/13 in Criminal Revision No.1642/2014; and as Annexures-P/8, P/9 & P/10 in Criminal Revision Nos.1644/2015 & 1647/2015) as also the order dated **04.07.2015** (filed as Annexure- P/19, P/17, P/13 & P/14 in Criminal Revision Nos.1640/2015, 1642/2014, 1644/2015 & 1647/2015 respectively) **are hereby quashed.** The learned Judge of the Special Court is directed to remit the charge sheet to the Chief Judicial Magistrate, Bhopal to proceed in accordance with law. It is made clear that this Court has not passed any order on the merits of the case and the competent Court shall proceed with the case afresh and expeditiously, in accordance with law and without being influenced by the earlier proceedings which took place before the Special Court or this High Court.

Revision allowed.

I.L.R. [2017] M.P., 977

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rajendra Mahajan

M.Cr.C. No. 2710/2012 (Jabalpur) decided on 18 March, 2016

RAJESH KUMAR SAMAIYA ...Applicant

Vs.

M/S. MAHAVEER STATIONERS & anr. ...Non-applicants

Negotiable Instruments Act (26 of 1881), Section 138 – Demand Notice **– Initially notice was issued and complaint was filed against one Azad Kumar Jain as partner of firm and during pendency of the case, complainant amended the cause title and name of Azad Kumar Jain was substituted by Sanad Kumar Jain, as partner of the firm – Charges were framed against Sanad Kumar Jain, against which in a revision, Sanad Kumar Jain was discharged of the charges – Held – Notice was issued against Azad Kumar Jain, who was neither the partner of the firm nor was the signatory of the cheques issued – Sanad Kumar Jain who was the partner of the firm and was the signatory of the cheques, was not issued any demand notice, which is a mandatory requirement u/S 138 of the Act – Revisional Court rightly discharged Sanad Kumar Jain – Application dismissed. (Paras 12, 13 & 14)**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – मांग नोटिस – आरंभ में, फर्म के भागीदार के रूप में एक आजाद कुमार जैन के विरूद्ध नोटिस जारी किया गया था एवं परिवाद प्रस्तुत किया गया था और प्रकरण लंबित रहने के दौरान परिवादी

ने वाद शीर्षक संशोधित किया और फर्म के भागीदार के रूप में आजाद कुमार के नाम को सनद कुमार जैन से प्रतिस्थापित किया गया था – सनद कुमार जैन के विरूद्ध आरोप विरचित किये गये जिसके विरूद्ध पुनरीक्षण में सनद कुमार जैन को आरोपों से आरोपमुक्त किया गया – अभिनिर्धारित – आजाद कुमार जैन के विरूद्ध नोटिस जारी किया गया था जो कि न तो फर्म का भागीदार था न ही जारी किये गये चैक का हस्ताक्षरकर्ता था – सनद कुमार जैन, जो कि फर्म का भागीदार था और चैक का हस्ताक्षरकर्ता था, को कोई मांग नोटिस जारी नही किया गया जो कि अधिनियम की धारा 138 के अंतर्गत आज्ञापक अपेक्षा है – पुनरीक्षण न्यायालय ने उचित रूप से सनद कुमार जैन को आरोपमुक्त किया – आवेदन खारिज।

Cases referred:

2008 (1) MPLJ SC 441, 2008 (2) SCC 321, 2007 AIR SCW 6482, 2008 (3) MPLJ 102 SC, 2007 (ii) MPJR S.N. 16, 2011 (I) MPLJ 644.

J.L. Soni, for the applicant.
Vinay Kumar Choukse, for the non-applicant No. 1.
Y.D. Yadav, P.L. for the non-applicant No. 2-State.

ORDER

Rajendra Mahajan, J. :- With the consent of learned counsel for the parties, the matter is finally heard at the admission stage.

1. The applicant has preferred the application under Section 378(4) of the Cr.P.C. seeking leave to appeal against the order of acquittal dated 24.11.2011 passed by the Third Additional Sessions Judge, Jabalpur in Criminal Revision No.278/2011, whereby the learned ASJ has quashed the charge under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') framed against respondent No.1 Sanad Kumar Jain setting aside the order of framing the charge dated 27.11.2011 passed by the JMFC (Shri Vivek Shukla) Jabalpur, in Criminal Complaint Case No.12763/08.

2. Brief facts of the case for just and proper adjudication of the application are thus:

(2.1) On 18.08.2008, the applicant filed a criminal complaint against the respondent No.1 for his prosecution under Section 138 of the Act in the court of JMFC, Jabalpur with the averments that Azad Kumar Jain is one of the partners of firm M/s Mahavir Stationers (for short 'the

firm') based at Jabalpur. He does all types of business transactions on behalf of the firm with the tacit consent of the other partners of it. On 15.10.2007, he took a loan of Rs.1,05,000/- in cash from him on behalf of the firm for expansion of business of the firm. Against the payment of loan, he issued three cheques (for short 'the cheques') to him of various amounts. The details of each cheque is given in para-3 of the complaint. All the cheques were drawn by him on the UCO Bank, Main Branch Jabalpur with which the firm maintains the account. On 08.07.2008, he deposited the cheques for encashment in his bank account which he has with the Allahabad Bank, Branch Fawara Chowk, Jabalpur. On 09.07.2008, his bank informed him that the drawer bank had dishonored the cheques on account of insufficient funds in the bank account of the respondent No.1. Thereupon, he gave a demand notice to Azad Kumar Jain in terms of Section 138 of the Act, by registered AD and through Madhur Courier. He refused to receive notice sent by registered AD. However, he received the notice sent through the said courier. Despite the receipt of notice, he did not pay the amount of the cheques. Hence, this complaint.

(2.2) Vide order dated 23.09.2008, the complaint is registered under Section 138 of the Act. On 27.07.2011, the learned JMFC framed the charge against the respondent No.1 Sanad Kumar Jain under Section 138 of the Act. Feeling aggrieved thereby, the respondent No.1 Sanad Kumar Jain filed the revision which was decided by the impugned order quashing the said charge.

(2.3) From a perusal of the impugned order, it appears that respondent No.1 Sanad Kumar Jain has filed the revision on the ground that before the filing of the complaint in the trial court, the applicant gave the demand notice to Azad Kumar Jain in terms of Section 138 of the Act. Thereafter,

the applicant filed the complaint against the firm through Azad Kumar Jain. After the registration of the complaint, the trial court issued summons to Azad Kumar Jain for his appearance in the case. The trial court received the summons unserved with a postal endorsement that there is no partner of the firm by the name of Azad Kumar Jain. Thereafter, the trial court issued a bailable warrant of arrest against Azad Kumar Jain and sent it to Police Station, Kotwali, Jabalpur with a direction to serve it upon him. The SHO of the said police station informed the trial court vide letter dated 01.12.2009 that a person by the name of Azad Kumar Jain is not found to be the partner of the firm. Thereafter, the applicant filed an amendment application dated 03.08.2010 in the trial court for the substitution of name of Sanad Kumar Jain in place of Azad Kumar Jain in the array of cause title of the complaint. Vide the order dated 03.08.2010, the trial court allowed the application. Later, the cause title of the complaint was amended by the applicant and in place of Azad Kumar Jain his name is substituted. Thereafter, the trial court issued summons to him and in compliance of the summons, he appeared in the case. Under the circumstances, the complaint is not maintainable against him as the applicant had not served the demand notice upon him under the provisions of Section 138 of the Act, which is mandatory. The learned revisional Judge has accepted the said contention and vide the impugned order quashed the charge against him under Section 138 of the Act which has the effect of the acquittal of him under the said charge.

3. The learned counsel for the applicant has argued that the address of the firm is rightly mentioned in the demand notice and the same is also mentioned in the complaint. However, the name of the partner of the firm by mistake is typed Azad Kumar Jain instead of Sanad Kumar Jain in the demand notice. After correction of the cause title of the complaint with the permission of the trial court and proper service of summons in the case upon respondent No.1 Sanad Kumar Jain, he cannot challenge the maintainability of the complaint on the ground that he was not served with the notice in terms of Section 138 of

the Act prior to the filing of the complaint. He also argued that the aforesaid discrepancy is minor in nature. Hence, the complaint cannot be thrown on the ground of the aforesaid discrepancy. In the interest of justice and the huge amount involved in the case, the learned revisional Judge ought not to have quashed the charge against respondent No.1 Sanad Kumar Jain. On the other hand, he ought to have allowed the prosecution of him. Hence, the impugned order is erroneous in law and on the fact. Therefore, the applicant be permitted to present an appeal against the impugned order.

4. Per contra, the learned counsel for respondent No.1 Sanad Kumar Jain argued that it is a mandatory requirement of Section 138 of the Act on the part of the payee or holder of cheque to give notice to the drawer of the cheque in a case of dishonor of cheque for his prosecution under the said Section. In this case, the applicant himself admits that no demand notice is given to respondent No.1 Sanad Kumar Jain prior to filing of the complaint. Since, the aforesaid mandatory requirement was not followed by the applicant, the learned revisional Judge rightly quashed the charge against respondent No.1 Sanad Kumar Jain.

5. I have considered the rival contentions, perused the impugned order and material on record.

6. Before entering into merits of the case, it will be seen what are the requirements of the demand notice to be given to a drawer before filing the complaint against him for his prosecution under Section 138 of the Act?

7. The Supreme Court in *C.C. Alavi Haji vs. Palapetty Muhammed* (2008 (1) MPLJ SC 441) has held that before filing of the complaint under Section 138 of the Act giving a demand notice to the drawer in terms of Clause (b) of the Proviso to Section 138 of the Act is mandatory. Similar view is taken by the Supreme Court in *Rahul Builders (M/s) Vs. Arihant Fertilizers and Chemicals (M/s) and another* (2008 (2) SCC 321) and *M/s Sarav Investment & Financial Consultants Pvt. Ltd. & Anr. vs. Llyods Register of Shipping Indian Office Staff Provident Funds & Anr.* (2007 AIR SCW 6482)

8. In case of *Rahul Builders* (supra), the complainant gave a demand notice to the accused to make payment of outstanding amount of bill instead of calling upon him to pay amount payable under the dishonored cheque. The Supreme Court has held that the demand notice was not strictly given in terms of Proviso (b) to Section 138 of the Act. Hence, the demand notice is invalid.

Only aforesaid ground, the Supreme Court quashed the criminal proceedings against the accused.

9. In *Mahendralal Shivhare vs State of M.P.* (2008 (3) MPLJ 102 SC), an amount of rupees eight lacs was due on the accused. He issued two cheques, each of rupees two lacs, to the complaint (sic:complainant). One of which was dishonored by the drawer bank on the ground of insufficient funds in the account of the accused. Instead of demanding the amount of dishonored cheque of rupees two lacs by the demand notice, the complainant sent the demand notice of the whole amount of rupees eight lacs. Upon the aforesaid facts of the case, the Supreme court held that the demand notice had not been given to the accused for the demand of amount of the dishonored cheque. Hence, the demand notice was invalid. Upon the very reason, the Supreme Court quashed the criminal proceedings against the accused holding that it is an abuse of the process of the court.

10. In *Phool Singh Rana vs. Shailendra Kumar Dubey* (2007 (ii) MPJR S.N. 16), the complainant had not served a demand notice in terms of Proviso (b) to Section 138 upon the accused. Thereupon, this court quashed the criminal proceedings for want of valid demand notice.

11. In *Akhilesh Saraf (Dr.) vs. Usha Tiwari (Smt.)* (2011 (I) MPLJ 644), the accused was neither a signatory to the dishonored cheque nor partner of the firm. Moreover, he had nothing to do with the business of the firm. This court held that the essential ingredients of Section 138 of the Act are missing. Resultantly, the complaint was quashed.

12. The crux of the aforestated case-laws is that the provisions of Section 138 of the Act mandate payee or holder of the cheque to give a demand notice to the drawer by a mode prescribed in the Act prior to the filing of the complaint and it must be for the amount of dishonored cheque. If the said ingredients are missing in the demand notice, then it will be rendered invalid. Upon which, the criminal proceeding against the drawer/accused is liable to be quashed.

13. Now, I will advert to the facts of the present case. It is obvious from the material on record and the admission made by the applicant that the demand notice in respect of dishonored cheques in terms of Section 138 of the Act was given to Azad Kumar Jain before filing the complaint in the trial court. Moreover, he is neither the signatory of the cheque nor the partner of the firm

nor he had anything to do with the business of the firm. In fact, respondent No.1 Sanad Kumar Jain is the partner of the firm and he is the drawer of the dishonored cheques. His name is substituted in the array of cause title of the complaint in place of Azad Kumar Jain during the trial of the case. This means that the applicant had not given demand notice to respondent No.1 Sanad Kumar Jain prior to the filing of the complaint in the trial court. From a perusal of the complaint, it is evident that the complainant has not made all the partners of the firm, the accused of the case and he had not given them the demand notices as well. As per the record, the demand notice sent by the applicant to Azad Kumar Jain by the registered post was returned unserved with the endorsement of the postal department to the effect that the name of addressee is not correct. In view of the above, the applicant ought to have made a short inquiry as to the correct names of the partners of the firm and thereafter within stipulated period he ought to have sent a fresh demand notice to them or at least the drawer of the cheques respondent No.1 Sanad Kumar Jain as claimed by the applicant. Hence, he has to suffer the legal consequences for not having sent a demand notice to respondent No.1 Sanad Kumar Jain, the drawer of the cheques, before filing the complaint. I do not see any merit in the plea raised by the learned counsel for the applicant that although Azad Kumar Jain is not the partner of the firm, yet the demand notice was sent to the correct address of the firm where it does its business because it is within the right of so called Azad Kumar Jain to refuse the demand notice on the ground that he is not the partner of the firm.

14. In view of the above discussions, I hold that the learned revisional Judge has rightly quashed the charge under Section 138 of the Act framed against respondent No.1 Sanad Kumar Jain by the trial court vide the impugned order. I, therefore, am of the opinion that there is no ground much less legal to interfere with the impugned order. In the result, the application under Section 378(4) of the Cr.P.C. moved by the applicant is dismissed in limine at the admission stage.

15. Accordingly, this M.Cr.C. is finally disposed of.

16. The records of both the courts below be sent back with a copy of this order.

Certified copy as per rules.

Application dismissed.

I.L.R. [2017] M.P., 984
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice C.V. Sirpurkar
M.Cr.C. No. 2616/2016 (Jabalpur) decided on 28 March, 2016

AKHTAR UDDIN & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 397(2) – Interlocutory order – **Test to determine whether the order rejects the plea of the accused on a point which when accepted will conclude the particular proceeding and whether the order substantially affects the rights of the parties – If answer of any one is affirmative, the order would not be interlocutory order – Bar of the Section 397(2) would not be attracted. (Para 9 & 10)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397(2) – अंतर्वर्ती आदेश – यह निर्धारित करने हेतु परीक्षण कि क्या आदेश अभियुक्त के अभिवाक् को उस बिन्दु पर अस्वीकार कर देता है जिसे यदि स्वीकार किया जाए तो विशिष्ट कार्यवाही समाप्त हो जाएगी और क्या आदेश सारभूत रूप से पक्षकारों के अधिकारों को प्रभावित करता है – यदि किसी एक का उत्तर सकारात्मक है, वह आदेश, अंतर्वर्ती आदेश नहीं होगा – धारा 397(2) का वर्जन आकर्षित नहीं होगा।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 397(2) – Revision against framing of charge – Maintainability – **Order framing charge is not an order which if passed in favour of the accused would terminate the proceedings, but also decides substantial rights of the parties – Not an interlocutory order – Revision is maintainable. (Para 16)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397(2) – आरोप विरचित किये जाने के विरुद्ध पुनरीक्षण – पोषणीयता – आरोप विरचित करने का आदेश, ऐसा आदेश नहीं है जो यदि अभियुक्त के पक्ष में पारित किया जाता है तो कार्यवाहियों को समाप्त करेगा परंतु पक्षकारों के सारभूत अधिकारों का विनिश्चय भी करेगा – अंतर्वर्ती आदेश नहीं है – पुनरीक्षण पोषणीय है।

Cases referred:

AIR 1978 SC 47, AIR 2000 SC 3346, AIR 1977 SC 2185, AIR 1980 SC 962, 1992 Cri.L.J. 810, 1989 Cri.L.J. 162, 1998 Cri.L.J. 776, AIR 2012 SC 431, AIR 2004 SC 1189, AIR 2012 SC 107.

Deepesh Joshi with *Qasim Ali,* for the applicants.
Vijay Soni, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This miscellaneous criminal case has been instituted on an application filed under section 482 of the Code of Criminal Procedure, filed on behalf of the accused persons. It is directed against the order dated 02.01.2016 passed by 2nd Additional Sessions Judge, Raisen in Criminal Revision No.35/2015 whereby, the order dated 20.02.2015 passed by JMFC Gaurharganj, District-Raisen framing a charge against accused persons under Sections 354-C of the IPC and 66-E of the Information Technology Act, 2000, was affirmed.

2. The facts necessary for disposal of this miscellaneous criminal case may briefly be stated thus: Learned 2nd Additional Sessions Judge, Raisen, without considering the revision petition on merits dismissed the same on a preliminary point, holding that an order framing charge against the accused is an interlocutory order and is therefore not amenable to revisionary jurisdiction of a superior Court in view of the bar engrafted in sub-section 2 of Section 397 of the Cr.P.C. Aforesaid order dated 02.01.2016, is subject matter of challenge before this Court in this miscellaneous criminal case filed under Section 482 of the Cr.P.C.

3. Impugned order has been assailed mainly on the ground that it is settled position of law that an order framing charge, is an intermediate order and not an interlocutory order; therefore, a revision thereagainst is maintainable. Learned counsel for the petitioners has invited attention of the Court to the observation made by learned Additional Sessions Judge in paragraph no.8 of the impugned order, wherein it has been observed that the main test for determining as to whether or not an order is an interlocutory order, is that if the prayer made by revision petitioners had been allowed by the Court below, it would have finally disposed of the case? In this regard, it has been contended that at the stage of framing of charge, the petitioners/accused persons had been praying before the Magistrate for discharge. Had their prayer been allowed by the trial Court, they would have been discharged and the criminal proceedings before the trial Court would have terminated; as such, the order impugned before learned Additional Sessions Judge was not an interlocutory order and thus was not hit by sub-section 2 of Section 397 of the Cr.P.C.

Hence, it has been argued on behalf of the petitioners that learned Additional Sessions Judge erred in law by applying the correct test for determining the nature of impugned order, incorrectly; therefore, it has been prayed that the impugned order be set aside and the matter be remitted back to learned Additional Sessions Judge for disposal of the criminal revision on merits.

4. Learned Panel Lawyer for the respondent /State on the other hand has supported the impugned order.

5. On due consideration of rival contentions, in the opinion of this Court, the miscellaneous criminal case under Section 482 of the Cr.P.C. must succeed, for reasons hereinafter stated: The Apex Court has held in the case of *Madhu Limaye Vs. State of Maharashtra,* AIR 1978 SC 47 that a final order or an intermediate order may be interfered with in a criminal revision but not an interlocutory order. An order rejecting the plea of the accused on a point which when accepted will conclude the particular proceeding cannot be held to be an interlocutory order.

6. Similar views were expressed by the Supreme Court in the case of *K.K. Patel Vs. State of Gujrat,* AIR 2000 SC 3346, wherein it was held that in deciding whether an order challenged is interlocutory or not as for S. 397(2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so, any order passed on such objections would not be merely interlocutory in nature as envisaged in S. 397(2) of the Code.

7. Likewise, in the case of *Amarnath & Ors Vs. State of Haryana,* AIR 1977 SC 2185 it has been observed that the expression 'interlocutory order' in Section 397(2) has been used in a restricted sense and not in a broad or artistic sense and merely denotes orders of purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the right of the parties cannot be said to be an 'interlocutory order.

8. In the case of *V.C. Shukla Vs. State,* AIR 1980 Supreme Court 962, the Supreme Court went on to observe that the term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial and the revisional power of the High Court or the Sessions Judge

could be attracted if the order was not purely interlocutory but intermediate or quasi- final.

9. On the basis of aforesaid authoritative pronouncements of Supreme Court following two tests emerge for determining as to whether or not an order is an interlocutory order:

> *7. Whether the order rejects the plea of the accused on a point which when accepted will conclude the particular proceeding?*
>
> *8. Whether the order substantially affects the rights of the parties?*

10. If answer to any one of the aforesaid two questions is in affirmative, the order would not be an interlocutory order, attracting the bar of section 397 (2) of the Cr.P.C.

11. In aforesaid view of the matter, there cannot be any doubt that learned Additional Sessions Judge applied absolutely correct test for determining as to whether or not an order framing charge is an interlocutory order; however, the question still remains as to whether or not that test was applied correctly to the order framing charge.

12. A full Bench of Rajasthan High Court in the case of *Jarnail Singh Vs. State of Rajasthan*, 1992 Cri.L.J 810, has held that an order framing charge in an order of moment. It deprives the liberty of a citizen and puts him to jeopardy of a trial. Such an order finally rejects the plea of the accused that he is entitled to discharge or that he is not liable to be tried. Such an order concludes the enquiry and the pre-trial proceedings against the accused. The order framing charge takes away a very valuable right of the accused. Hence, an order framing charge is not an interlocutory order within the meaning of S. 397(2) and such an order is amenable to the supervisory jurisdiction of the Court of Session and the High Court u/S. 397(1), Cr. P.C.

13. A coordinate bench of this High Court in the case of *Ramchandra Vs. State of M.P,* 1989 Cri.L.J 162, has expressly held that:

> *"15. In the decision in Dattatraya's case 1982 Cri LJ 1025 (Bom) the aforesaid SC decisions in Amarnath's case (1977 Cri LJ 1891), Madhu Limaye's case (1978 Cri LJ 165) and Vidya Charan's case*

(1980 Cri LJ 690) (supra) have been referred to and it has been held that the order framing charge is not an interlocutory order within the meaning of the expression as used in S.397(2) of the Code. I hold that the revision is maintainable."

14. Another coordinate bench of this Court in the case of *Khagesh Goel Vs. State of M.P,* 1998 Cri.L.J 776 has adopted a more nuanced approach to the question and held that:

"14. I, therefore, conclude that the order passed at the time of framing the charge negativing the plea of the accused that no charge is made out and he is entitled to be discharged is not an interlocutory order and revision petition is maintainable and such an order is not hit by the provisions of S. 397(2), Cr.P.C. On the other hand if the plea of the accused is that a minor charge is made out instead of charge framed by the order of framing charge, such an order is certainly an interlocutory order and the revision petition against such an order is not maintainable and is hit by provisions of Section 397(2), Cr.P.C. 14.I, therefore, conclude that the order passed at the time of framing the charge negativing the plea of the accused that no charge is made out and he is entitled to be discharged is not an interlocutory order and revision petition is maintainable and such an order is not hit by the provisions of S. 397(2), Cr.P.C. On the other hand if the plea of the accused is that a minor charge is made out instead of charge framed by the order of framing charge, such an order is certainly an interlocutory order and the revision petition against such an order is not maintainable and is hit by provisions of Section 397(2), Cr.P.C."

15. It may further be noted that in the cases of *Ashish Chadha Vs. Asha Kumari,* AIR 2012 SC 431, *State of Maharashtra Vs. Salman Salim Khan,* AIR 2004 SC 1189 and *Menna Devi Vs. State of Rajasthan,* AIR 2012 SC 107, the Apex Court has dilated upon the manner in which discretion is required to be exercised in a revision against charge; however, it has not been held that such a revision is not maintainable at all.

16. In view of aforesaid pronouncements of the Supreme Court and the various High Courts, it is absolutely clear that an order on charge is not only an order which if passed in favour of the accused would terminate the

proceedings but is also an order which decides substantial rights of the parties. Hence, an order framing charge is not an interlocutory order. A revision against such an order is certainly maintainable. It is obvious that learned revisionary Court has applied one of the two correct tests for determining the nature of the order impugned before it, incorrectly and has thus erroneously held that a criminal revision against an order framing charge is barred by sub-section 2 of Section 397 of the Cr.P.C. That being the case, the impugned order is not sustainable in the eyes of law.

17. Consequently, this criminal revision is **allowed,** the impugned order dated 02.01.2016 passed in Criminal Revision No.35/2015, is set aside. The matter is remitted back to the Court of learned Additional Sessions Judge for its disposal on merits.

Application allowed.

I.L.R. [2017] M.P., 989

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Atul Sreedharan

M.Cr.C. No. 21205/2015 (Jabalpur) decided on 21 September, 2016

RAJESH KUMAR GUPTA & anr. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Section 498-A/34 and Dowry Prohibition Act (28 of 1961), Section 3/4 – Quashing of FIR*** **– Complainant is wife of brother of petitioner No. 2 and petitioner No. 1 is husband of petitioner No. 2 – Omnibus allegations against them that they have pressurised complainant to provide 35 lakhs to buy a flat for her and her husband in Hyderabad – They have also abused, beaten and harassed the complainant mentally and physically for dowry demand – They have come to Jabalpur for attending the marriage on 13.04.2015 and flew back to Delhi on 20.04.2015 and back to London on 04.05.2015 – There was no further occasion for interaction of the petitioners with the complainant – Held – Since the charge sheet did not disclose any offence against the petitioners – The undesirable and mechanical process of taking cognizance of offences against accused persons mentioned in the charge sheet is unsustainable which has the propensity of reducing the criminal court to a tool of**

convenience in the hands of unscrupulous complainant who would like to contort the criminal justice process – Proceedings initiated against petitioners quashed. (Paras 13, 24, 15 & 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता (1860 का 45), धारा 498–ए/34 एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 – प्रथम सूचना प्रतिवेदन का अभिखंडित किया जाना – परिवादी, याची क्र. 2 के भाई की पत्नि है तथा याची क्र. 1, याची क्र. 2 का पति है – उनके विरूद्ध बहुप्रयोजनीय/भिन्न अभिकथन हैं कि उन्होनें परिवादी पर स्वयं अपने और अपने पति के नाम से हैदराबाद में फ्लैट खरीदने हेतु पैंतीस लाख रू. का प्रबंध करने हेतु दबाव बनाया – दहेज की मांग के संबंध में उन्होनें परिवादी के साथ दुर्व्यवहार, मारपीट तथा मानसिक और शारीरिक उत्पीड़न भी किया – दिनांक 13.04.2015 को विवाह में उपस्थित होने के लिए, वे जबलपुर आये तथा दिनांक 20.04.2015 को दिल्ली वापस लौटे एवं दिनांक 04.05.2015 को लंदन वापस लौट गये – उसके बाद ऐसा कोई अवसर नहीं आया कि वादीगण की परिवादी से मुलाकात हुई हो – अभिनिर्धारित – चूंकि आरोप–पत्र याचीगण के विरूद्ध कोई अपराध प्रकट नहीं करता – आरोप–पत्र में वर्णित अभियुक्तगण के विरूद्ध, अपराध का संज्ञान लेने की अवांछनीय तथा यांत्रिकी प्रक्रिया अपोषणीय है, जिसमें आपराधिक न्यायालय को ऐसे बेईमान परिवादी के हाथ में एक सुविधा का साधन बनाने की प्रवृत्ति है, जो कि आपराधिक न्याय प्रक्रिया को विकृत करना चाहती है – याचीगण के विरूद्ध आरंभ की गई कार्यवाही अभिखंडित।

***B. Issuing Summons – Duty of the Court* – It is expected of the Court to go through the charge sheet, the documents and the statements of the witnesses u/S 161 Cr.P.C. and examine if necessary to take cognizance of the offences stated in the charge sheet, summon any or all of the persons arrayed as accused by the police – Where, the trial Court is of the opinion that there is some evidence which may reveal a slight suspicion against a person, it ought to take recourse of the procedure u/S 156(3) Cr.P.C. and remand the matter to the police for further investigation, rather than taking cognizance and summon a person as an accused where the evidence on record prima facie reveals only a peripheral presence of such a person. (Para 15)**

ख. समन जारी किया जाना – न्यायालय का कर्तव्य – न्यायालय से यह प्रत्याशा की जाती है कि आरोप–पत्र, दस्तावेजों तथा दण्ड प्रक्रिया संहिता की धारा 161 के अंतर्गत साक्षीगण के कथनों का अवलोकन करे एवं परीक्षण करे यदि आरोप–पत्र में वर्णित अपराधों का संज्ञान लेना आवश्यक है, पुलिस द्वारा अभियुक्त के रूप में दोषारोपित व्यक्तियों में से किसी को या सभी को समन करे – जहाँ विचारण न्यायालय इस मत का है कि कुछ साक्ष्य हैं जो कि व्यक्ति के विरूद्ध कुछ संदेह प्रकट कर सकते

हैं, उसे दण्ड प्रक्रिया संहिता की धारा 156(3) के अंतर्गत प्रक्रिया का सहारा लेना चाहिए एवं जहां अभिलेख पर उपलब्ध साक्ष्य प्रथम दृष्ट्या ऐसे व्यक्ति की केवल परिधीय उपस्थिति प्रकट करता हो वहां संज्ञान लेने और व्यक्ति को अभियुक्त के रूप में समन करने की अपेक्षा आगे अन्वेषण हेतु मामला पुलिस को प्रतिप्रेषित करना चाहिए।

Cases referred:

(2010) 7 SCC 667, (2016) 3 SCC 724, (1998) 5 SCC 749.

A.M. Trivedi with *Manoj Singh,* for the applicants.
B.P. Pandey, G.A. for the non-applicant No. 1.
Shilpa Gupta, non-applicant No. 2 in person.

ORDER

ATUL SREEDHARAN, J. :- This is a petition under Section 482 of Cr.P.C. filed for the quash of F.I.R. being Crime No.44/2015 of P.S. Woman Police Station, Madan Mahal, Jabalpur for offences U/s.498- A/34 of I.P.C. and U/s.3/4 of Dowry Prohibition Act. The prayer in this petition is for the quash of the aforementioned F.I.R. on the ground that the same is vexatious, vengeful, filed for the purpose of harassing the Petitioners herein and is a gross abuse of process of the law. The Petitioner No.1 is husband of the Petitioner No.2. The Petitioner No.2 is the sister-in-law of the Respondent No.2 Mrs. Shilpa Gupta, who is married to the brother of the Petitioner No.2 Mr. Vivek Gupta. The Respondent No.2 is the author of the FIR which is sought to be quashed by this court.

2. The Respondent No.2/Complainant has appeared in person and has moved I.A. No.18136/16 seeking permission to change her counsel. I.A. No.18108/16 is an application moved by erstwhile Counsel of the Respondent No.2, who has prayed that his name be struck off from the record on account of the unacceptable behaviour of RespondentNo.2 towards her counsel. For the reasons stated in the said applications, I.A. No.18136/16 and I.A. No.18108/16 are allowed.

3. I.A. No.3852/16 is an application for taking additional documents on record on behalf of Respondent No.2. I.A. No.16936/16 is an application again moved by the Respondent No.2 for taking additional documents on record. For the reasons stated in the said applications, the same are allowed and documents annexed therewith are taken on record and have been considered by this Court.

4. As Respondent No.2/Complainant has appeared in person, this Court has specifically asked her if she wants to engage a lawyer to which she has replied that though she has moved an application for change of Lawyer, she wants to argue the case personally. The State is represented by Mr. B.P. Pandey, learned Government Advocate, who has argued on behalf of the State praying for the dismissal of this petition. Vide an elaborate seven-page complaint dated 1.9.2015, made by Respondent No.2 to the S.H.O. of Mahila Police Station at Jabalpur, the Respondent No.2 has sought the prosecution of the Petitioners herein and other coaccused persons. Along with the said complaint, the Respondent No.2 has annexed four documents which are the certificate given by the *"Kaushaudhan Samaj*, the photographs taken at the time of the engagement and the marriage, the invitation cards relating to the marriage from the side of both the bride and the groom, the print out of screen shots of an allegedly fictitious face-book account and also photographs of burn marks suffered by the Respondent No.2 on her stomach, allegedly at the hands of her husband. The copy of the said complaint had been forwarded to ten other authorities which include the Prime Minister of India and to the Chief Minister of the State of Madhya Pradesh.

5. In this complaint, the Respondent No.2 has stated that on 6.2.2015 the mother and father of the Petitioner No.2 had gone to the house of Respondent No.2 with a marriage proposal. Thereafter, on 10.2.2015, the brother (husband of Respondent No.2) father, mother and the elder brother of the Respondent No.2 went to see the RespondentNo.2 at her House bearing No.1009, Tilwaraghat Road, Sagda, Jabalpur. Thereafter, it is the case of the Respondent No.2 that on 11.2.2015, the father of Respondent No.2 in accordance with his stature, conducted the engagement of the Respondent No.2 with the brother of Petitioner No.2 at Hotel Arihant in Jabalpur. It is also alleged that on the day of the engagement, the father of Respondent No.2 in accordance with his financial capacity had given Rs.2 Lakhs in cash and gifted Rs. 20,000/- to the brother of the Petitioner No.2 for the purpose of buying clothes. Besides this, an amount of Rs.1100/- is stated to have been given to every member of the family and relations of the Respondent No.2. Under the circumstance, it is alleged by Respondent No.2 that her father had incurred an expenditure of about Rs.4-5 Lakhs at the time of the engagement itself.

6. According to the Respondent No.2, sourness developed between the parties on 14.2.2015 itself when the father of Respondent No.2 informed the

father of the Petitioner No.2 that for the purpose of marriage, he has booked Hotel Satyaraksha. At that time, the father of Petitioner No.2 is alleged to have mocked the father of Respondent No.2 saying that the sweets and fruits that were given at the time of engagement turned out be rotten and therefore it was disposed off as garbage. It is pertinent to mention here that it is undisputed that Petitioners herein were not present along with other family members at this point of time. Thereafter, on 16.4.2015 the marriage of the Respondent No.2 was solemnised with the brother of Petitioner No.2. At the time of marriage, the brother of the Petitioner No.2 was working at Hyderabad. Thereafter, the Respondent No.2 has alleged in sum and substance, that her husband and her father-in-law, mother-in-law and the elder brother of her husband were consistently torturing her mentally and physically to bring Rs.35 Lakhs from her father for the purchase of house in Hyderabad. She has also further stated that her husband never consummated the marriage with her despite several attempts by her and that the husband would force her to sleep in a separate room. She has also voiced her apprehension that her husband was involved with another woman as he would leave her alone and go downstairs and speak for a long time to someone on the mobile phone. She has also stated that her husband used to stay away from her for long hours under the pretext of work load. The Respondent No.2 has also alleged that her husband opened a fake face-book account in the name of one Renu Gupta in which derogatory averments were made against the Respondent No.2 and her family. She also states that during her stay with her in-laws, her husband, husband's elder brother, father-in-law and mother-in-law used to tell her that the way they had compelled their elder daughter in law to leave within three months of the marriage, they would do the same thing with Respondent No.2. Finally, on 15.8.2015, the husband of the Respondent No.2 is alleged to have brought Respondent No.2 from Hyderabad to Jabalpur and left her in parental home by telling her that there exists no relationship with them and that he has been transferred to Pune where he shall now henceforth be staying.

7. After having gone through the extremely elaborate F.I.R., what stands out clearly is that the majority of the allegations relating to the matrimonial cruelty are all directed against the father, mother, the elder and the younger brother of the Petitioner No.2. The specific allegations against the Petitioners herein, if at all they can be said to be specific, is limited to paragraph 6 of the FIR where the Respondent No.2 alleged that on 20.04.15, after the husband

of the Respondent No.2 left for Hyderabad, and when all the relations had gone from the house of her in-laws, the mother-in-law, father-in-law, the elder brother of her husband and the Petitioners herein are alleged to have told the Respondent No.2 to tell her father to provide for rupees thirty five lakhs to purchase a flat for the Respondent No.2 and her husband in Hyderabad, and till such time, they would not let the Respondent No.2 enjoy a matrimonial life with her husband. It is clear that the allegation is omnibus in nature and not specific to the Petitioners herein.

8. The second reference to the Petitioners is in paragraph seven of the FIR in which the Respondent No. 2 states that "on 19.04.2015 itself after leaving Vivek (husband of the Respondent No.2) who was leaving for Hyderabad at the station, the sister-in-law (the Petitioner No.2 herein), the husband of the sister-in-law (the Petitioner No. 1 herein) and the elder brother in law, abused the Complainant with filthy abuses". This allegation is also omnibus in nature and does not specify what the abuses were and who said what. More importantly, the Complainant does not mention the context in which she was abused by the Petitioners herein and for what. The Complainant makes it appear that she was abused by the Petitioners herein merely for the sake of offending her, without any reason.

9. Finally in paragraph eighteen of the FIR, the Respondent No.2 levels another omnibus charge against the Petitioners to the effect "that my husband, mother-in-law, father-in-law, elder brother-in-law, sister-in-law (Petitioner No.2 herein), husband of the sister-in-law (Petitioner No.1 herein) from the day after the marriage started demanding rupees thirty-five lakhs in dowry and used to beat and torture me mentally and physically". To sum up the allegations against the Petitioners herein, (a) they are said to have, in conjunction with the others members of the family, pressurised the Respondent No.2 to provide for rupees thirty five lakhs by asking her father for the same in order to buy a flat for her and her husband in Hyderabad, (b) abused the Respondent No.2 along with the elder brother of the Petitioner No.2 on 19.04.15 and (c) beat and harassed the Respondent No.2 mentally and physically in conjunction with the other co-accused persons in order to compel her to fulfil the dowry demand of rupees thirty five lakhs.

10. Ld. Sr. Counsel for the Petitioners has drawn my attention to Annexure P/1 at page 10 and 11 of the petition which is the airline tickets of the Petitioner No.2 showing his journey from London to New Delhi on 10/04/15, reaching

Delhi on 11/04/15 and that of the Petitioner No.2 from London to New Delhi on 18/03/15. Both the Petitioners then travelled from Delhi to Jabalpur on 13/04/16 (sic:13/04/15) to attend the marriage of the Respondent No.2 with the brother of the Petitioner No.2 on 16/04/15. Though the journey ticket of the Petitioner No.2 from Delhi to Jabalpur does not appear to be on record, the ticket of the Petitioner No.1 is there on record which shows the date of journey form (sic:from) Delhi to Jabalpur as 13/04/15. After attending the marriage of the Respondent No.2, the Petitioners flew back to Delhi from Jabalpur on 20/04/15 and back to London on 04/05/15. From page 13 to 24 of the Petition, are copies of the passports of the Petitioners with the visa stampings by the immigration authorities at UK and India, corresponding to the date of the journeys undertaken by the Petitioners. The itinerary of the Petitioners from London to Jabalpur and back have not been disputed by the Respondent No.1 or 2. In fact, the Respondent No.2 has herself relied upon one of the tickets showing the journey of the Petitioners from Jabalpur to Delhi on 20/04/15 which is annexed to her reply as Annexure R2/10. Thus, the undisputed period of presence of the Petitioners in India is that they reached Jabalpur to attend the marriage of the Respondent No.2 with the brother of the Petitioner No.2 on 13/04/15, attended the marriage on 16/04/15 and returned to London on 04/05/15. The Ld. Counsel for the Petitioners has submitted that the Respondent No.2 never stayed with the Petitioners and the interaction of the Petitioners with the Respondents was only during the abovesaid period. The same is also not disputed by the Respondent No.2 who however states that the acts amounting to cruelty were committed by the said Petitioners during that short period of interaction with the Respondent No.2 which have been summarised in paragraph 9 supra . There was no further occasion for interaction of the Petitioners with the Respondent No.2 as the relationship between the Respondent No.2 and her husband deteriorated so rapidly after marriage that they separated within four months of marriage and the husband of the Respondent No.2 is alleged to have sent her back home on 15/08/15, from when the two have been living separately.

11. Ld. Counsel for the Petitioners has stated that all the allegations against the Petitioners have been levelled in order to rope them in and harass them as is evident from the facts of the case itself as laid out in the FIR lodged by the Respondent No.2. He has referred to the judgement of the Supreme Court in *Preeti Gupta and Another Vs. State of Jharkhand and Another* – (2010) 7 SCC 667. In this case, the Petitioners were the married sister and unmarried

brother of the Complainant's husband who lived separately from the Complainant and her husband and were roped in by the Complainant in a criminal complaint before the Magistrate. In paragraph 10 of the said judgement it appears that the Complainant in that case did not dispute, that the Petitioners therein lived separately and that they had never spent any time with the Complainant. In paragraph 29 of the judgement, the Supreme Court arrives at the finding that the implication of the Petitioners **"in the complaint is meant to harass and humiliate the husband's relatives"** as the admitted position in that case was, that the Petitioner No.1 was a permanent resident of Navsari in Gujarat, where she lived with her husband for over seven years, and that the Petitioner No.2, the brother-in-law of the Complainant who lived in Goregaon and that the Petitioners had never visited the Complainant and her husband. The Supreme Court quashed the case against the Petitioners therein. The observations of the Hon'ble Supreme Court are extremely relevant and meaningful. In paragraph 32, taking note of the impromptu nature of the complaints involving matrimonial disputes, it observes that **"It is a matter of common experience that most of the complaints under section 498-A are filed in the heat of the moment over trivial issues without proper deliberations..... ".** In paragraph 33, the Ld. Judges elaborate on the role played by the Ld. Members of the Bar in such cases and how the members of the Bar must exercise circumspection while advising clients in such cases to ensure that the **"..... social fibre, peace and tranquillity of the society remains intact."** In paragraph 35, the Supreme Court adds a caveat for the courts to be **".....extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complainant are required to be scrutinised with great care and circumspection."**

12. The second case on which reliance has been placed by the Ld. Senior Counsel appearing on behalf of the Petitioners is *Ram Saran Varshney and Others Vs. State of Uttar Pradesh and Another* – (2016) 3 SCC 724 . In this case too, the Appellants 4, 5 and 6 were the married sisters-in-law of the Complainant and they were all residing independently with their families and the only interaction that they had with the Complainant was on the occasions

of "Graha Pravesh" of the Complainant's house and the naming ceremony of the Complainant's daughter. The Supreme Court held in paragraph 30 and 31 of the judgement that **"We are of the view that the visit of the three sisters-in-law of the Respondent 2 Sonia Gupta on the above two occasions were for celebration and cannot be treated as occasions where they harassed the Respondent 2. In any case, in the absence of any material on the record of this case, relating to harassment on the above two occasions , we are satisfied, that the proceedings initiated against Appellant 4, 5 and 6 consequent upon the registration of the first information report by the Respondent 2 Sonia Gupta on 10-4-2002 was not justified. The same deserves to be quashed. The same is accordingly hereby quashed."** The Ld. Counsel for the Petitioners has emphasised that the instant case is identical as (a) the only occasion when there was a very brief interaction between the Petitioners and the Respondent No.2 was at the time of marriage of the Respondent No.2 and (b) there is no material on record other than the omnibus allegation against the Petitioners that they ever harassed the Respondent No.2 during the brief interaction that they had with her at the time of the marriage.

13. The Respondent No.2 has submitted that the Petitioners were present at the marriage and that they too had acted as in the manner alleged in the FIR, registered by her. She has also relied upon the ticket placed on record by the Petitioners to show their presence in Jabalpur at the time of the marriage. This is however an undisputed fact. The Respondent No.2 has also drawn the attention of the Court to the photographs annexed by her to show that she was burnt by a hot iron by her husband and that her husband opened a fake Face Book account with the fictitious ID of one Renu Gupta in which derogatory things were written about the Respondent No.2 and her family. She has also drawn the attention of this Court to the email sent by her to her father informing him of the cruelties committed upon her by her husband when she was living with him at Hyderabad. However, all these allegations even if admitted to be true are all against her husband and not against the Petitioners herein.

14. The Ld. Counsel for the Respondent No.1 State has reiterated the submissions of the Respondent No.1 and has also submitted that since the charge sheet has already been filed, no order can be passed U/s. 482 Cr.P.C by this Court. He has also stated that a preliminary inquiry was done by the police and only thereafter was the FIR lodged and a detailed investigation

carried out.

15. In such cases, the Court of First Instance must desist the urge to take cognizance U/s. 190 (1) or 190 (2) Cr.P.C mechanically and summoning all the persons so arrayed as accused by the police in the charge sheet or by the Complainant in the complaint u/s. 200 Cr.P.C. Nothing can be more unjust than summoning a person as accused in a criminal trial only because the police has filed a charge sheet against him or that the Complainant has levelled allegations against him in the Complainant (sic:Complaint) and statement U/s. 200 Cr.P.C. It is trite law that the Trial Court is not the mouth piece of the prosecution and that it must not act as a post office when the charge sheet is filed. Though the said observations were made by the Supreme Court in cases at the stage of framing of charge by the Trial Court the same principle would assume relevance at the stage of taking cognizance also, when examined in the backdrop of the observations of the Supreme Court in *Pepsi Foods Ltd., Vs. Special Judicial Magistrate* – (1998) 5 SCC 749 , wherein at paragraph 28 it held **"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused".** Though the said judgement was passed in the backdrop of a complaint case, in cases where cognizance is sought to be taken on the basis of a charge sheet filed by the police, it is expected of the Court to go through the charge sheet, the documents and the statements of the witnesses u/s. 161 Cr.P.C and examine if it is necessary to take cognizance of the offences stated in the charge sheet and summon any or all of the persons arrayed as accused by the police, to

stand trial. Where, the Trial Court is of the opinion that there is some evidence which may reveal a slight suspicion against a person, it ought to take recourse to the procedure U/s. 156(3) Cr.P.C and remand the matter to the police for further investigation, rather than take cognizance and summon a person as an accused where the evidence on record prima facie reveals only a peripheral presence of such a person in the narrative of the prosecution's case rather than an active involvement in the offence complained of. The Trial Court is not helpless where it comes to its notice that a person who was not sent for trial may perhaps have been an active participant in the offence. Recourse can always be had to Section 319 Cr.P.C where the active involvement of person against whom the court did not take cognizance becomes clear through the statement of the witnesses in court.

16. In the instant case, the Petitioners have been compelled to approach this Court which would have been obviated had the Ld. Trial Court taken the pains to see that the charge sheet filed in this case, when examined in the light of the judgments of the Supreme Court in similar cases, did not disclose any offence against the Petitioners herein. The undesirable and mechanical process of taking cognizance of offences against accused persons mentioned in the charge sheet is unsustainable in the eyes of the law which has the propensity of reducing the criminal courts to a tool of convenience in the hands of unscrupulous complainants who would like to contort the criminal justice process of either wrecking vengeance on someone or resort to the criminal courts as an alternative to a civil recourse. It goes without saying that an order refusing to take cognizance by the Trial Court in a fit case, would have to state reasons briefly, disclosing the mind of the Trial Court as to why it refused to take cognizance in a given case. However, the importance of not taking cognizance in a mechanical manner by the Trial Court cannot be underscored enough.

17. The petition succeeds and is allowed. FIR in Crime No. 44/15 of P.S. Woman Police Station (Mahila Thana), Madan Mahal, Jabalpur for offences U/ss. 498-A r/w 34 of Indian Penal Code and 3 and 4 of the Dowry Prohibition Act, 1961, and all proceedings arising therefrom pending in the Court of the Ld. JMFC are quashed as far as the same relate only to the Petitioners herein in M.Cr.C No. 21205/2015, Mr. Rajesh Kumar Gupta, S/o. Mr. Vinod Prakash Gupta and Mrs. Richa Gupta, W/o. Mr. Rajesh Kumar Gupta.

Application allowed.

I.L.R. [2017] M.P., 1000
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Anand Pathak
M.Cr.C. No. 12889/2015 (Gwalior) decided on 22 September, 2016

SAURABH TRIPATHI & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 498-A, 323 & 506/34 – Quashing of the FIR*** – **Petitioners are the relatives of the husband of the complainant – All of them living separately and have been arrayed as accused on the basis of omnibus allegation – Prior to the registration of the FIR the husband of the complainant submitted a written complaint in which he has already expressed his apprehension about the conduct of his wife – Supreme Court, time and again, has deprecated this practice of implicating the family members of the husband in FIR as co-accused in the matrimonial disputes – Held – In absence of any specific allegation the FIR registered against the petitioners liable to be quashed. (Paras 11, 13 & 23)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराएँ 498–ए, 323 व 506/34 – प्रथम सूचना रिपोर्ट अभिखंडित की जाना – याचीगण, परिवादी के पति के रिश्तेदार हैं – सभी पृथक रूप से निवास कर रहे हैं और उन्हें बहुप्रयोजनीय अभिकथन के आधार पर अभियुक्त के रूप में आलिप्त किया गया – प्रथम सूचना प्रतिवेदन पंजीबद्ध किये जाने के पूर्व, परिवादी के पति ने लिखित शिकायत प्रस्तुत की थी जिसमें उसने पहले ही अपनी पत्नी के आचरण संबंधी आशंका व्यक्त की है – उच्चतम न्यायालय ने विवाह विषयक विवादों में पति के परिवार के सदस्यों को प्रथम सूचना प्रतिवेदन में सह–अभियुक्त के रूप में आलिप्त करने के इस चलन की बार बार निन्दा की है – अभिनिर्धारित – किसी विनिर्दिष्ट अभिकथन की अनुपस्थिति में याचीगण के विरूद्ध पंजीबद्ध प्रथम सूचना प्रतिवेदन अभिखंडित किये जाने योग्य है।

B. ***Penal Code (45 of 1860), Section 498-A – Reconciliation proceeding*** – **Husband of the complainant submitted a written complaint in which he has already expressed his apprehension about the conduct of his wife – It is the duty of the investigation officer to objectively consider the factum of reconciliation proceeding if any going on between the parties as**

well as the apprehension of husband and/ or his relatives reflected through some complaint made to police authorities. (Para 22)

ख. दण्ड संहिता (1860 का 45), धारा 498–ए – सुलह की कार्यवाही – परिवादी के पति ने लिखित शिकायत प्रस्तुत की जिसमें उसने पहले ही अपनी पत्नी के आचरण संबंधी आशंका व्यक्त की है – यह विवेचना अधिकारी का कर्तव्य है कि वह पक्षकारों के बीच सुलह की कार्यवाही, यदि कोई हो तथा साथ ही पति एवं/अथवा उसके रिश्तेदारों की आशंका जो कि पुलिस प्राधिकारियों को शिकायत के जरिए दर्शाई गई है, के तथ्य को वस्तुनिष्ठ रूप से विचार में लें।

Cases referred:

(2010) 7 SCC 667, (2012) 10 SCC 741, 2012 (1) MPLJ (Cri.) 543, (2014) 8 SCC 273.

Shishir Kumar Saxena, for the applicants.
R.K. Awasthi, P.P. for the non-applicant No. 1/State.
Pooran Singh Rana, for the non-applicant No. 2.

(Supplied: Paragraph numbers)

ORDER

ANAND PATHAK, J. :- With the consent of parties, matter heard finally.

2. The present petition under Section 482 of Cr.P.C. has been preferred by the present petitioners seeking quashment of FIR registered against them vide crime No.481/2015 at Police Station Hazira, District-Gwalior for the alleged offences under Sections 498-A, 323 and 506/34 of IPC.

3. Facts of the case in brief are that petitioners No.1 and 2 are brother in law and sister in law (Jeth and Jethani respectively) and petitioner No.3 is sister in law (Nanad) of respondent No.2/complainant.

4. A complaint was filed by respondent No.2 on 23/09/2015 and FIR was registered under Sections 498-A, 323 and 506/34 of IPC against the present petitioners as well as husband of the complainant.

5. Learned counsel for the petitioners submits that marriage of respondent No.2/complainant was solemnized on 03/06/2013. Petitioners No. 1 & 2 are living separately at Bangalore (State of Karnataka) since 2011; much before the marriage of respondent No.2/complainant. Petitioner No.1 is working as software consultant at Bangalore. Necessary documents have been filed in

this regard as Annexure P/4 to P/7. Similarly, petitioner No.3 got married 15 years back prior to the alleged date of incident and she resides with her husband separately at different house in Gwalior city and at no point of time, she resided with respondent No.2/complainant.

6. Learned counsel for the petitioners submits that after the marriage of the complainant solemnized on 03/06/2013, some differences have cropped up in the relationship of the complainant and her husband- Gourav Tripathi, therefore, her husband has made a complaint to the Police Station, Hazira on 26/08/2015 regarding mis-behaviour of the complainant/his wife. He categorically alleged in the said complaint about the intention of his wife (present complainant) to implicate him and his family members on false pretext. On 27/08/2015, he made a complaint to the Superintendent of Police, District-Gwalior also, alleging the same facts. On the basis of the complaint filed by the husband of the complainant-Gourav Tripathi on 21/09/2015, both the parties were called upon by the Family Settlement Center, Gwalior and after discussions with both the parties, the matter was partially settled and next follow up date was given as on 28/09/2015 wherein, the husband and wife had to appear and further resolve their differences, if any, existed. It seems that before the next follow up date i.e. 28/09/2015, respondent No.2/ complainant had filed a compliant on 23/09/2015 for demand of dowry alongwith certain other allegations and FIR was registered.

7. Learned counsel for the petitioners further submitted that during the reconciliation proceedings also, the complainant had never alleged about the act of petitioners for demand of dowry. Implication of the petitioners is in fact came as an after thought. Further contentions of the petitioners are that they have been falsely implicated in the present case while they have not committed any alleged offence in any manner whatsoever. Petitioners No.1 & 2 are living at a distinct place at Bangalore whereas petitioner No.3 is a married women living with her husband and family members and not living with the present complainant. They have no reasons to harass the complainant or to make any demand of dowry. Only omnibus allegations against the present petitioners have been levelled and no specific instances of demand of dowry have been mentioned or elaborated by the complainant. Neither the complaint nor the statement made by the complainant as per Section 161 of Cr.P.C. could suggest the involvement of present petitioners for demand of dowry.

8. Learned counsel for the petitioners relied upon the judgments rendered

by the Hon'ble Supreme Court in the matter of *Preeti Gupta Vs. State of Jharkhand* (2010) 7 SCC 667, *Geeta Mehrotra, Another Vs. State of Uttar Pradesh and Another* (2012) 10 SCC 741, and followed by this Court in the matter of *Dashrath P. Bundela and Others* 2012 (1) MPLJ (Cri.) 543.

9. On the other hand, learned counsel for respondent No.1/State on the basis of the case diary submits that the complainant has made the allegation against the present petitioners and therefore, the case has rightly been registered against the present petitioners. Learned counsel for respondent No.2/complainant (Smt. Jyotirani Tripathi) submits that the petitioners also demanded dowry from the complainant telephonically and they were involved in the demand of dowry therefore, they have been implicated. He also submits that the statements of complainant and her sister suggest the involvement of present petitioners. Both the counsel for the respondents prayed for dismissal of the case.

10. Heard the learned counsel for the parties and with their assistance, perused the record.

11. There is no dispute about the fact that the petitioners No.1 and 2 are living at Banglore since June, 2011. Copy of the house rental agreement as well as the pay slip of the employer/company have been filed by the petitioners to establish the fact that they are living at Banglore since year 2011. Similarly, petitioner No.3 is also living at different place in Gwalior which is reflected from the document (Aadhar Card) of petitioner No.3 filed alongwith the petition.

12. From perusal of the documents, it is further figured out that souring of relationship between husband and wife led to reconciliation proceedings before the Family Settlement Centre and at the time of filing of complaint, the said re-conciliatory proceedings were under way. It is also not in dispute that the husband of the complainant has made two complaints against his wife, prior to F.I.R., one is on 26/08/2015 to Station House Officer, Police Station Hazira and another on 27/08/2015 to the Superintendent of Police, Gwalior about the misbehaviour of his wife and about the prospective line of prosecution she may adopt against him and his family members. According to the husband of the complainant, his wife used to compel him to leave the present place of their marital home and settle at Delhi; city of her maternal home.

13. Petitioners No.1 & 2 are living at such a distant place at Bangalore

from where the allegation of demand of dowry can not be expected to be true or can be substantiated. It is ridiculous to expect the demand of dowry telephonically. Similarly, perusal of the case diary and challan papers reveals that only omnibus allegations have been levelled against the present petitioners. No specific allegations in respect of demand of dowry and/or mental or physical harassment have been alleged.

14. The law is well settled in this regard. The Hon'ble Supreme Court, time and again, has deprecated this practice of implicating the family members of the husband in FIR as co-accused in the matrimonial disputes. The Supreme Court in the matter of *Preeti Gupta* (supra) has held as below:-

> ***30.*** *It is a matter of common knowledge that unfortunately matrimonial litigation is rapidly increasing in our country. All the Courts in our country including this Court are flooded with matrimonial cases. This clearly demonstrates discontent and unrest in the family life of a large number of people of the Society.*
>
> ***31.*** *The Courts are receiving a large number of cases emanating from Section 498-A of the Penal Code which reads as under:*
>
> *"498-A. Husband or relative of husband of a woman subjecting her to cruelty.- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.*
>
> *Explanation.- For the purpose of this Section, 'cruelty' means-*
>
> *(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*
>
> *(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by*

her or any person related to her to meet such demand."

34. Unfortunately, at the time of filing of the complaint the implications and consequences are not properly visualised by the complainant that such complaint can lead to insurmountable harassment, agony and pain to the complainant, accused and his close relations.

35. The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a Herculean task in majority of these complaints. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. The Courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegation of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection."

15. Similarly, in the matter of *Geeta Mehrotra and Another* (supra), the Supreme Court has again reiterated almost the same spirit.

16. This High Court in the matter of *Dasrath* (supra) while considering the judgment rendered by the Supreme Court in the matter of *Preeti Gupta* (supra) has quashed the prosecution under Section 498-A of IPC against the near relatives of husband of the complainant because there is no specific allegations about the demand of dowry and the time when she was beaten, specific month, year or date and time and by whom, was not mentioned.

17. The ratio of the judgments rendered by the Supreme Court as well as this Court suggests that allegations of harassment of husband's close relatives, who had lived separately and occasionally visited the matrimonial house of the complaint (sic:complainant) are required to be scrutinized with great care and circumspection. The Hon'ble Apex Court has mandated that when the

matrimonial dispute arises between the parties of marriage, they lead to multiple cases, therefore, the Apex Court expected from the learned members of the Bar that they should also ensure that one complaint should not lead to multiple cases.

18. Sounds like detouring, but goes in line with context when this Court relies upon the mandate of Hon'ble Supreme Court in the matter of *Arnesh Kumar Vs. State of Bihar and Another* (2014) 8 SCC 273, wherein Supreme Court has dealt with in respect of matter related to Section 498-A of IPC and 3/4 of Dowry Prohibition Act and had given certain directions, as contained in para-11.

19. The Hon'ble Supreme Court in the said case has deprecated the growing tendency of impleading the relatives of the family of husband under Section 498-A of IPC for harassment.

20. Para-4 of the said judgment is a revelation for better understanding of the controversy which reads as under:-

> *" There is a phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A IPC is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bedridden grandfathers and grandmothers of the husbands, their sisters living abroad for decades are arrested. " Crime in India 2012 Statistics " published by the National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for the offence under Section 498-A IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the*

husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under the Penal Code. It accounts for 4.5% of total crimes committed under different sections of the Penal Code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498-A IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as, 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal."

21. In the light of aforesaid principle of law, I have carefully considered the allegations made in the FIR and statement recorded under Section 161 of Cr.P.C. in relation to demand of money and alleged harassment to respondent No.2/complainant. There is no specific allegation that when demand was made, when she was beaten, by whom, no specific year, month, date or time was mentioned. Before registration of the FIR, husband of the complainant has already expressed his apprehension about the conduct of his wife in the complaint made to the Station House Officer Police Station Hazira, Gwalior as well as Superintendent of Police, Gwalior. Further the re-conciliation proceedings were under way at Family Settlement Center when the FIR was registered on the complaint filed on 23/09/2015 by respondent No.2/complaint (sic:complainant). These aspects also indicate that the complainant has deliberately implicated the present petitioners for demand of dowry or for harassment.

22. The investigating Officer while investigating the case under Section 498-A of IPC should also take note of the mandate given by the Hon'ble Supreme Court in respect of those relatives who are living at different city or separately and desists from arraying them as accused on the basis of omnibus allegations. Similarly, it is the duty of the Investigating Officer to objectively consider the factum of reconciliation proceedings if any going on between the parties as well as the apprehensions of husband and/or his relatives reflected through some complaints made to police authorities. These aspects may not be conclusive in nature, but certainly indicate the complexion of the controversy.

23. Considering the aforesaid facts and circumstances of the case, I am of the view that there is no prima facie case made out against these petitioners; near relatives of husband of respondent No.2/complainant and permitting to

continue such criminal proceedings against them would be abuse of process of law. Hence, prosecution against these petitioners is liable to be quashed.

24. Thus, the petition is allowed and the prosecution launched against these petitioners (three in number) on the basis of Criminal Case No..481/2015 registered at Police Station Hazira, District-Gwalior for the offence under Sections 498-A, 323 and 506/34 of IPC and subsequent proceedings, if any, are hereby quashed.

Application allowed.

I.L.R. [2017] M.P., 1008
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan
M.Cr.C. No. 10350/2006 (Jabalpur) decided on 29 September, 2016

ARUN KAPUR ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. Penal Code (45 of 1860), Sections 279, 337, 338 & 304-A and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashing of criminal proceeding **– A Roller Machine being used for construction of road, being driven negligently by its driver non-applicant No. 2, caused injuries to three persons and out of them one succumbed to the said injuries – Applicant was not named in the FIR – There are no specific allegation at all against him, he has been made accused only on account of being the president of company – Held – Liability for offence involving element of negligence or rashness is always direct and restricted in its application only to the person to whom the impugned act is directly attributed – No one can be made liable for an offence if that person did not cause the effect of such rash or negligent act by his own action. (Para 8)**

क. दण्ड संहिता (1860 का 45), धाराएँ 279, 337, 338 व 304–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – दाण्डिक कार्यवाही अभिखंडित की जाना – सड़क निर्माण हेतु रोलर मशीन का उपयोग किया जा रहा था, उसके चालक अनावेदक क्र. 2 द्वारा उसे उपेक्षापूर्ण ढंग से चलाये जाने के कारण तीन व्यक्तियों को चोटें कारित की और उनमें से एक की उक्त चोटों के कारण मृत्यु हुई – आवेदक को प्रथम सूचना प्रतिवेदन में नामित नहीं किया गया – उसके विरूद्ध कोई भी विनिर्दिष्ट अभिकथन नहीं, उसे केवल कंपनी का अध्यक्ष होने के नाते अभियुक्त बनाया गया है – अभिनिर्धारित –

अपराध जिसमें उपेक्षा या उतावलेपन का तत्व शामिल है, के लिए दायित्व सदैव प्रत्यक्ष होगा तथा उसकी प्रयोज्यता केवल उस व्यक्ति के लिए सीमित होगी जिस पर आक्षेपित कृत्य प्रत्यक्ष रूप से आरोपित है – किसी व्यक्ति को अपराध का उत्तदायी नहीं माना जा सकता यदि उस व्यक्ति ने अपने स्वयं के कार्य द्वारा उक्त उतावलेपन या उपेक्षापूर्ण कृत्य का प्रभाव कारित नहीं किया है।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Motor Vehicles Act (59 of 1988), Section 180 & 181*** **–The offending vehicle which was involved in the accident belonged to the company and was not the personal property of the applicant – Therefore the provisions u/S 180 & 181 of Motor Vehicle Act will not be applicable on the applicant. (Para 9)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं मोटर यान अधिनियम (1988 का 59), धारा 180 व 181 – आक्षेपित वाहन जो दुर्घटना में शामिल था, वह कंपनी का था और आवेदक की व्यक्तिगत संपत्ति नहीं था – अतः आवेदक पर मोटर यान अधिनियम की धाराएँ 180 व 181 लागू नहीं होगी।

C ***Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Whether complainant is required to be heard*** **– Complainant is not required to be heard in this particular case because neither the applicant has been named in the FIR nor there is any imputation against him for being involved in the offence – Since the Application is pending since the year 2006 it is not practical or in the interest of justice to now implead the complainant or some one from his family as a respondent to oppose this Application – Charge sheet so far as it relates to the applicant is quashed. (Para 10 & 11)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – क्या परिवादी को सुना जाना अपेक्षित है – इस विशिष्ट प्रकरण में परिवादी को सुना जाना अपेक्षित नहीं क्योंकि आवेदक को न तो प्रथम सूचना प्रतिवेदन में नामित किया गया और न ही अपराध में शामिल होने का उसके विरूद्ध कोई आरोप है – चूंकि आवेदन वर्ष 2006 से लंबित है, इस आवेदन का विरोध करने के लिए अब परिवादी अथवा उसके परिवार के किसी व्यक्ति को प्रत्यर्थी के रूप में पक्षकार बनाना व्यवहारिक अथवा न्यायहित में नहीं – आरोप पत्र, जहां तक आवेदक से संबंधित है अभिखंडित किया जाता है।

Case referred:

2015 (12) SCC 781.

S.K. Gangrade, for the applicant.

D.K. Paroha, P.L. for the non-applicant No. 1.
None present for the non-applicant No. 2.

ORDER

ATUL SREEDHARAN, J. :- This is a petition under Section 482 of the Code of Criminal Procedure, 1973 filed for quash of criminal proceeding arising from Crime No. 218/2005 of P.S. Narsinghpur, District Narsinghpur pending in the Court of learned Chief Judicial Magistrate, Narsinghpur parties being *State of Madhya Pradesh Vs. Arun Kumar and another*. The petitioner is the accused no.2 before the learned trial Court. The petitioner is a resident of New Delhi and at the time of filing this petition, was the President and CEO of Quipo Infrastructure Equipment Ltd. (known earlier as Indian Infrastructure Equipment Ltd.). It is also stated therein that the said company is a body corporate, duly registered under the relevant provisions of the Companies Act, 1956, and having its registered office at New Delhi and is involved in the business of renting infrastructure equipment/vehicles.

2. It is the case of the Respondent No.1 that on 04.03.2005, at about 4:00 AM, a Roller machine (Ingersoll-Rand Model RTR-220), which was being used by M/s Tapi Prestress Products Ltd., in the construction of a road between Narsinghpur and Gotegaon, was alleged to have been driven negligently by its driver Arun Kumar Kahar, the respondent No.2 herein, on account of which three persons namely, Vishal Singh Lodhi, Sahab Singh Rajput and Mahsewari Sharma suffered injuries and Vishal Singh Lodhi eventually succumbed to the said injuries.

3. It is the case of the petitioner that he was not named in the FIR as an accused. The complainant in this case is shown as Vishal Singh Lodhi, who succumbed to the injuries. The police after investigation filed the chargesheet before the learned trial Court, in which, the petitioner has been shown as an Accused No.2. Learned counsel for the petitioner has stated that there are no specific allegations at all against the petitioner herein and he has been made an accused only on account of being the President of Quipo Infrastructure Equipment Ltd. (earlier known as Indian Infrastructure Equipment Ltd.).

4. Learned counsel for the petitioner has stated that the petitioner has been sought to be roped in by a contorted application of vicarious liability, whereas, in a road accident case, it is only the driver who is liable to be prosecuted for an offence under Section 304-A of IPC. After investigation,

the police has filed the charge-sheet against the Respondent No.2 as the Accused No.1 and the Petitioner as the Accused No.2. Charge sheet was filed under (a) Section 279 of IPC, which is an offence involving rash driving or riding on a public way and the person who is liable to be tried and punished, is the person who was driving the vehicle, (b) under Section 337 of IPC which is an offence made punishable for causing hurt by an act endangering life or personal safety of others, where again it is the person who caused such hurt by doing anything so rashly or negligently so as to endanger human life or personal safety of others, who shall be held liable for the said offence, (c) under Section 338 of IPC which is for causing grievous hurt by an act endangering life or personal safety of the others which is, yet again only applicable on the person who does the act which endangers the life of any persons by causing grievous hurt to them and (d) section 304-A of IPC.

5. Besides the aforementioned, offences under Sections 180 and 181 of the Motor Vehicles Act has also being inserted in the charge-sheet. Section 180 is applicable only where the owner, or the person in-charge of motor vehicle allowed any other person to drive the said vehicle who does not satisfy the provisions relating to license as laid out in sections 3 and 4 of Motor Vehicles Act, punishable with imprisonment for a term which may extend to three months. As regard to section 181 of Motor Vehicles Act, it only provides for punishment for anyone who drives the motor vehicle in contravention of sections 3 or 4.

6. Learned counsel for the petitioner states that besides vicarious liability, the applicant has sought to be snared in this case using the provisions under Section 180 whereby the owner of the person in-charge of the vehicle becomes liable for allowing any person not so authorized otherwise drive the vehicle. It is undisputed that the petitioner herein was not even remotely involved with the accident. It is also undisputed that he was a President of the company which leases out Infrastructure Equipment to those who required it and was based in Delhi during the material point of time. Learned counsel for the petitioner in order to show that on the date on which the accident taken place, the vehicle in question was actually rented out to Tapi Prestress Products Ltd., which is a company incorporate under the Companies Act, 1956. The said rental agreement is Annexure-A/3 from Page-19 to 23. The said agreement was only for a period of 7 months which was extendable and commencement date is shown as 01.04.2014, however, the accident had taken place almost 11 months thereafter, therefore, on the basis of

this document, it cannot be stated that on the date of the accident Tapi Prestress Products Ltd. was still in possession and use of the vehicle in question as no document pertaining to the extension of the agreement beyond 7 months has been placed on record by the petitioner.

7. The only question that arises before this Court whether the prosecution against the petitioner is maintainable. Looking into the facts and circumstances of the case and that the Petitioner was the President and CEO of Quipo Infrastructure Equipment Ltd. (known at the time of the incident as Indian Infrastructure Equipment Ltd.,), which owned the offending vehicle which otherwise was being operated by the respondent No.2 on the date of the incident. All the witnesses whose statement have been recorded U/s. 161 Cr.P.C also suggest that it was the respondent No.2 who was a driving the vehicle and caused the accident.

8. The principle of vicarious liability cannot be applied in a contorted manner just to implicate the top echelons of a corporate entity where their prima facie involvement is not apparent. If such a situation is acceptable only on the ground that the owner of the offending vehicle is liable to be prosecuted along with the driver for an offence under Section 304-A of the IPC, in every case of a motor vehicle accident, the owner of the vehicle would automatically be roped in for the offence U/s. 304-A. Such does not seem to be intention of the legislature in relation to those offences where the elements of rashness or negligence is required for the fulfillment of the offence. The statute, on the other hand makes it evidently unambiguous that it is only the person to whom the negligent or rash act is attributable to, who is liable to be prosecuted for an offence involving the elements of rashness or negligence. Liability for an offence having the element of negligence or rashness is always direct and restricted in its application only to the person to whom the impugned act is directly attributed. No one can be made constructively liable for an offence involving negligence or rashness if that person did not cause the effect of such rash or negligent act by his own actions. In short, there can be no vicarious liability for an offence involving negligence or rashness under the general law like the Indian Penal Code. Special Laws may have provisions to the contrary. In the case under consideration, Sections 279, 337, 338 and 304-A of the IPC all involve the element of negligence or rashness which must be imputable to the actions of the person so sought to be made punishable under these sections.

9. It is undisputed that the petitioner, at that relevant point of time was the President of Quipo Infrastructure Equipment Ltd., (earlier known as Indian

Infrastructure Equipment Ltd.) a company registered under the relevant provisions of the Companies Act, 1956. The offending vehicle which was involved in the accident belonged to the abovesaid company and was not the personal property of the Petitioner. Therefore, the provisions U/s. 180 and 181 of the Motor Vehicles Act also will not be applicable on the Petitioner as the State has failed to show that the Petitioner was either the owner of the vehicle and/or he was in charge of the said vehicle at the time of the accident or later. Besides, Section 199 of the Motor Vehicles Act provides for the prosecution of the Companies for offences under the said Act. The Director or any person involved in the affairs of the company can only be proceeded against if the company itself is made an accused. It is also undisputed that the Company has not been made an accused in this case. In this regard, the judgment of the Hon'ble Supreme Court in the case of *Sharad Kumar Sanghi Vs. Sangeeta Rane,* 2015(12) SCC 781 is squarely applicable. The Petitioner in that case was the Director of Sanghi brothers and was sought to be prosecuted for an offence, inter-alia, under Section 420 of IPC, on the basis of a complaint case under Section 200 of Cr.P.C filed in the Court of learned Judicial Magistrate, First Class, Betul. A quash petition preferred before this Court was dismissed on account of which the petitioner approached the Supreme Court in which, while quashing the complaint before the Court of learned Judicial Magistrate First Class, Betul, the Supreme Court held in paragraph 13, that when the company has not been arrayed as an accused, the order summoning the Managing Director of that company could not have been passed and so the Supreme Court was pleased to quash the said complaint against the Director of the company. In the instant case also the company has not been made an accused, so therefore, on that ground also, besides the merits of the case, the case against the petitioner is liable to be quashed.

10. The Ld. Counsel for the State has pointed out that the instant being a quash petition U/s. 482 Cr.P.C, the Complainant ought to be heard before deciding the same. This Court after considering the said submission on the part of the Respondent State considers the same as not relevant in this particular case. Usually, giving an opportunity to the *de facto* Complainant to oppose a quash petition is a *sine qua non* in most cases. In cases where it is evident from the FIR and the evidence gathered in the course of investigation (if any) that the Complainant has levelled specific allegations against a person in the FIR or in the statements U/s. 161 Cr.P.C, a quash petition moved by

such a person against whom there is a direct imputation by the Complainant of having committed the offence or has been named in the FIR or the statements of the witnesses under section 161 Cr.P.C, it becomes imperative to involve the Complainant as a Respondent to a quash petition filed by the such an accused person. However, in this case, the Petitioner has not been named in the FIR and neither has there be any imputation against him for being involved in the offence which has been committed by the Respondent No.2. Besides, the *de facto* complainant died as a result of the injuries received by him in the accident and now, making someone from his family a Respondent, only to fulfill a requirement under the common law, which in the considered opinion of this Court has to be seen and applied in the facts and circumstances of the case which is seen to have been pending since the year 2006 and that there has been a stay of the proceedings before the Court of the Ld. JMFC, it is not practical or in the interest of justice to now implead the Complainant or someone from his family as a Respondent to oppose this petition. It is also relevant to mention here that the Petitioner has been arrayed as an accused in the charge sheet by the police after completion of investigation and not by the Complainant.

11. Under the circumstances, the charge-sheet arising from Crime No.218/2005 of P.S. Narsinghpur, pending before the learned Chief Judicial Magistrate, Narsinghpur, is quashed insofar as it relates to the petitioner herein. As far as the respondent No.2 is concerned who is the Driver alleged to have caused the accident, the Ld. Trial Court is requested to proceed against him in accordance with the law.

12. Accordingly, the petition is finally disposed of.

Order accordingly.